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# The Americans with Disabilities Act and Australia's Disability Discrimination Act: Overcoming the Inadequacies

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# COMMENTS

## THE AMERICANS WITH DISABILITIES ACT AND AUSTRALIA'S DISABILITY DISCRIMINATION ACT: OVERCOMING THE INADEQUACIES

### I. INTRODUCTION

The United States is not a newcomer to the disability legislation arena. Efforts to protect the civil rights of Americans with disabilities<sup>1</sup> began as early as the 1940s.<sup>2</sup> These initial endeavors led to the enactment of legislation such as the Civil Rights Act of 1964<sup>3</sup> and the Rehabilitation Act of 1973,<sup>4</sup> and culminated in the passage of the Americans with Disabilities Act of 1990 (ADA).<sup>5</sup> Today, in addition to federal legislation, many states have enacted their own disability discrimination laws.<sup>6</sup>

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1. This Comment uses the phrase "individual [or person] with a disability," to refer to members of the disability community. Activists in the disability rights movement endorse this phrase "over such phrases as 'disabled people,' . . . or 'the disabled,'" because it "emphasizes personhood rather than the disability." Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1342 n.2 (1993). For information about "people first" terminology, see ADAPTIVE ENVIRONMENTS CENTER, INC., THE AMERICANS WITH DISABILITIES ACT FACT SHEET SERIES, FACT SHEET NO. 3, COMMUNICATING WITH PEOPLE WITH DISABILITIES (1992).

2. For example, in 1948, Congress enacted a statute to prevent employment discrimination against individuals with disabilities in the federal civil service. See Act of June 10, 1948, ch. 434, Pub. L. No. 80-617, 62 Stat. 351 (codified in scattered sections of 42 U.S.C.); see also GERARD QUINN ET AL., DISABILITY DISCRIMINATION LAW IN THE UNITED STATES, AUSTRALIA AND CANADA 19 (1993).

3. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000e-17 (1994) (prohibiting discrimination in places of public accommodation).

4. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1994) (prohibiting employment discrimination by federal agencies and recipients of federal funding).

5. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994) [hereinafter ADA].

6. See, e.g., Unruh Civil Rights Act, CAL. CIV. CODE §§ 51-54 (West 1982) (prohibiting discrimination in the State of California).

In stark contrast, Australia did not, until recently, enact federal legislation to address disability discrimination issues. The 1992 Disability Discrimination Act (DDA)<sup>7</sup> represents the Australian Commonwealth's first attempt to develop protections for individuals with disabilities.<sup>8</sup> On its face, the DDA potentially surpasses the ADA's comprehensiveness and effectiveness because the DDA defines "disability"<sup>9</sup> in broader terms than does the ADA.<sup>10</sup> The DDA may thus afford protection to more individuals with disabilities than does the ADA. Unfortunately, the DDA's comprehensiveness does not extend beyond its preliminary definitions; consequently, the protections the DDA provides are often inconsequential.

This Comment analyzes and compares the disability laws of Australia and the United States and proffers that an amalgamation of the two nations' laws would be the most effective way to afford persons with disabilities the protections to which they are entitled. Part II of this Comment discusses the ADA's history and content. Part III summarizes the DDA and its history. Part IV compares the two disability discrimination laws, enumerates the strengths and weaknesses of each, and discusses the effects of these strengths and weaknesses on case law. Finally, Part V proposes that the most viable solution to alleviate the weaknesses in both

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7. Disability Discrimination Act, 1992 (Austl.) [hereinafter DDA].

8. See QUINN ET AL., *supra* note 2, at 123 (noting that the DDA is "the only Australian anti-discrimination statute dealing exclusively with disability discrimination.").

9. The DDA defines "disability" as one of the following:

- (a) total or partial loss of bodily or mental functions;
- (b) total or partial loss of a part of the body;
- (c) the presence in the body of organisms causing disease or illness;
- (d) the presence in the body of organisms capable of causing disease or illness;
- (e) the malfunction, malformation or disfigurement of a part of the body;
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction;
- (g) a disorder, illness or disease that affects the thought processes, perception of reality, emotions or judgment or that results in disturbed behavior; and includes a disability that:
- (h) presently exists; or
- (i) previously existed but no longer exists; or
- (j) may exist in the future; or
- (k) is imputed to a person . . .

DDA § 4(1)(a)–(k).

10. For purposes of the ADA, an individual has a "disability" if the individual "(A) [has] a physical or mental impairment that substantially limits one or more of the major life activities of such an individual; (B) [has] a record of such an impairment; or (C) [is] regarded as having such an impairment." 42 U.S.C. § 12102(2)(A)–(C) (1994).

the ADA and the DDA entails drafting new legislation that combines the most expansive language from each law. This revamping will create comprehensive and effective legislation that will provide meaningful safeguards to prevent discrimination against all individuals with disabilities.

## II. DISABILITY DISCRIMINATION LEGISLATION IN THE UNITED STATES

Congress enacted a multitude of disability anti-discrimination laws predating the ADA.<sup>11</sup> This history of protective legislation enlightened the American public and engendered a compassionate understanding of the needs and rights of the disability community.<sup>12</sup> In turn, this awareness fostered the American public's collective perception that accommodating people with disabilities is a "necessary means of providing equal rights."<sup>13</sup> Despite public awareness and volumes of legislation, "no federal law prohibited the majority of employers, program administrators, [and] owners . . . of places of public accommodation . . . from discriminating at will against people with disabilities"<sup>14</sup> until the ADA's enactment. "[A]s late as early 1990 Americans with disabilities continued to suffer discrimination in *all* walks of life."<sup>15</sup> In 1990, Congress enacted the ADA to "signal[] the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life."<sup>16</sup>

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11. See BONNIE POITRAS TUCKER, *FEDERAL DISABILITY LAW IN A NUTSHELL* 4-5 (2d ed. 1998) (noting that some of the most prominent of these laws include: Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1994); Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1485 (1994); Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-4157 (1994); Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3619 (1994); Child Abuse Amendments of 1984, 42 U.S.C. §§ 5101-5106, 5111-5113, 5115, 10401 (1994)).

12. See Bonnie Poitras Tucker, *The Disability Discrimination Act: Ensuring Rights of Australians with Disabilities, Particularly Hearing Impairments*, 21 MONASH U. L. REV. 15, 16-17 (1995).

13. *Id.* (commenting on the civil rights consciousness in the United States, as compared to the general absence of such a consciousness in Australia).

14. TUCKER, *supra* note 11, at 5.

15. *Id.*

16. Statement by President George Bush Upon Signing [the ADA], 26 WEEKLY COMP. PRES. DOC. 1165, 1166 (July 30, 1990) [hereinafter Statement by President Bush].

### A. *The Americans with Disabilities Act of 1990*

The ADA is divided into five substantive parts: Titles I through V. This Comment focuses primarily on Titles I, II, and III, which respectively address employment discrimination, public services offered by public entities, and public accommodations, services, and amenities offered by private entities.<sup>17</sup>

On July 26, 1990, President George Bush signed the ADA into law.<sup>18</sup> According to President Bush, the ADA was a clear expression by the American people of "[their] most basic ideals of freedom and equality."<sup>19</sup> President Bush declared that the new legislation "promise[d] to open up all aspects of American life to individuals with disabilities . . . ."<sup>20</sup> Upon enactment, the ADA's immediate purpose was to provide: (1) "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;"<sup>21</sup> (2) "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;"<sup>22</sup> and (3) "to ensure that the Federal Government plays a central role in enforcing the standards established . . . on behalf of individuals with disabilities."<sup>23</sup>

To qualify for protection under the ADA, an individual must have an "impairment," as described in the ADA's definition of "disability." The ADA defines "an individual with a disability" as one who: (1) has "a physical or mental impairment"<sup>24</sup> that

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17. See QUINN ET AL., *supra* note 2, at 45 (discussing the ADA's five titles). Title IV addresses telecommunications services. See 47 U.S.C. § 225 (1994). Title V addresses miscellaneous matters. See 42 U.S.C. § 12201 (1994). Congress assigned the responsibilities of regulating compliance with and enforcement of the ADA as follows: the Equal Employment Opportunity Commission (EEOC) (Title I); see 42 U.S.C. § 12116; the U.S. Attorney General (U.S. Department of Justice (DOJ)) (Titles II and III, except for the transportation provisions); see 42 U.S.C. § 12134; the Department of Transportation (DOT) (Title II and Title III transportation provisions); see 42 U.S.C. § 12149.

18. See QUINN ET AL., *supra* note 2, at 45.

19. Statement by President George Bush, 26 WEEKLY COMP. PRES. DOC. at 1165.

20. *Id.*

21. 42 U.S.C. § 12101(b)(1).

22. *Id.* § 12101(b)(2).

23. *Id.* § 12101(b)(3).

24. The term "physical or mental impairment" means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine, or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and

substantially limits<sup>25</sup> one or more of the major life activities of such an individual;<sup>26</sup> (2) has “a record of such an impairment;”<sup>27</sup> or (3) is “regarded as having such an impairment.”<sup>28</sup> The extent of the protection afforded to an individual with a disability depends on the nature of the entity providing the protection and the type of impairment involved.

### 1. Employment Discrimination: Title I<sup>29</sup>

Title I of the ADA is designed “to prevent employers from discriminating against qualified employees with disabilities.”<sup>30</sup> It provides, in pertinent part, that no covered entity “shall discriminate against a qualified individual with a disability because of the disability of such an individual in regard to job application

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specific learning disabilities.

29 C.F.R. § 1630.2(h)(1)–(2) (1998).

25. The term, “substantially limits,” means:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

*Id.* § 1630.2(j)(1)(i)–(ii).

26. 42 U.S.C. § 12102(2)(A). “Major life activities” means “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.” 29 C.F.R. § 1630.2(i).

27. 42 U.S.C. § 12102(2)(B).

28. *Id.* § 12102(2)(C). The phrase “is regarded as having . . . an impairment” means:

- (1) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a covered entity as constituting such limitation;
- (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- (3) Has [no qualified impairment] but is treated by a private entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(l)(1)–(3). See generally Christopher David Ruiz Cameron & Matthias Wagner, *Unchained Maladies: The Proper Treatment of Asymptomatic Diseases as “Disabilities” Under the Americans with Disabilities Act*, 12 CAL. LAB. & EMP. L.Q. 3, 5 (1998) (discussing the three categories of ADA disabilities).

29. The Title I provisions effective on July 27, 1992 apply to all private and public employers with 25 or more employees. See Pub. L. No. 101-336, § 108, 104 Stat. 327, 337 (1990) (codified at 42 U.S.C. § 12111(5)(A)). On July 26, 1994, Title I also became effective for employers with 15–24 employees. See *id.* See also Sande Pond, *An Overview of the Americans with Disabilities Act (ADA)*, LEGAL SERVICES SEC. NEWS (St. Bar Cal. Legal Serv. Section, San Francisco, Cal.), Fall 1993, at 14.

30. Sande L. Buhai, *Practice Makes Perfect: Reasonable Accommodation of Law Students with Disabilities in Clinical Placements*, 36 SAN DIEGO L. REV. 137, 142 (1999).

procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."<sup>31</sup>

A "covered entity" is an "employer,"<sup>32</sup> employment agency, labor organization, or joint labor-management committee."<sup>33</sup> Title I prohibits covered entities from discriminating against "qualified individuals;" that is, those who, "with or without reasonable accommodation,"<sup>34</sup> can perform the essential functions<sup>35</sup> of the employment position that such an individual holds or desires."<sup>36</sup> Only those individuals with disabilities that are able to perform the "essential functions" of a job "stand to gain under Title I."<sup>37</sup> Therefore, ascertaining the essential functions of an employment position is critical in determining whether an individual with a disability qualifies for reasonable accommodation under the ADA.<sup>38</sup> The following House Committee Report explains the "interrelationship between the

31. 42 U.S.C. § 12112(a).

32. Effective July 26, 1994, an "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." 42 U.S.C. § 12111(5)(A).

33. *Id.* § 12111(2).

34. Examples of workplace accommodations might include: "instructions [provided] both orally and in writing, frequent and specific feedback from supervisors, quiet workspace, and training course accommodations." Patricia H. Latham, *Learning Disabilities and the Law After High School: An Overview for Students*, LEARNING DISABILITIES ASS'N NEWSBRIEFS (Learning Disabilities Assoc. Am., Pittsburgh, Pa.), July-Aug. 1998, at 3.

35. The term, "essential functions," means "the fundamental job duties of the employment position that the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position." 29 C.F.R. § 1630.2(n)(1) (1998).

Evidence of whether a particular function is essential includes, but is not limited to:

- (i) The employer's judgement as to which functions are essential;
- (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
- (iii) The amount of time spent on the job performing the function;
- (iv) The consequence of not requiring the incumbent to perform the function;
- (v) The terms of a collective bargaining agreement;
- (vi) The work experience of past incumbents on the job; and/or
- (vii) The current work experience of incumbents in similar jobs.

*Id.* § 1630.2(n)(3)(i)-(vii).

36. 42 U.S.C. § 12111(8).

37. QUINN ET AL., *supra* note 2, at 57.

38. See Buhai, *supra* note 30, at 145.

'essential function' requirement and the 'reasonable accommodation requirement:'"<sup>39</sup>

If a person with a disability applies for a job and meets all the selection criteria except one that he or she cannot meet because of a disability, the criterion must concern an essential, non-marginal aspect of the job, and be carefully tailored to measure the person's actual ability to do this essential function of the job. If the criterion meets this test, it is nondiscriminatory on its face and it is otherwise lawful under the [ADA]. However, the criterion may not be used to exclude an applicant with a disability if the criterion can be satisfied by the applicant with a reasonable accommodation. A reasonable accommodation may entail adopting an alternative, less discriminatory criterion.<sup>40</sup>

Finally, an "accommodation is *not* reasonable if it would impose an 'undue hardship' on [an] employer's business."<sup>41</sup> Consequently, employers are relieved of their duty to comply with the ADA if they demonstrate that such hardship would result.<sup>42</sup> In order to qualify for the "undue hardship exemption,"<sup>43</sup> the employer's hardship must entail "significant difficulty or expense."<sup>44</sup> Although the standards set by the ADA serve as

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39. H.R. REP. NO. 101-485, pt. 2, at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 353-354.

40. *Id.*

41. TUCKER, *supra* note 11, at 82; *see also* 42 U.S.C. § 12111(10)(A). For the ADA "undue hardship" exemption, *see* 42 U.S.C. § 12112(b)(5)(A); *see also* 29 C.F.R. § 1630.2(p) (1998).

42. *See generally* TUCKER, *supra* note 11, at 82.

43. *See* 42 U.S.C. § 12112(b)(5)(A). "[W]hen enacting the ADA[,] Congress refused to apply a presumption that any accommodation that cost more than ten percent of a[n] individual with a disability's salary would constitute an undue hardship." TUCKER, *supra* note 11, at 84. Rather, "[e]ach case must be decided on an individual basis." *Id.* In determining whether an accommodation imposes an undue hardship on a covered entity, the following factors are considered:

- (i) The nature and net cost of the accommodation . . . ;
- (ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
- (iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;
- (iv) The type of operation . . . of the covered entity . . . ; and
- (v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

29 C.F.R. § 1630.2(p)(2)(i)-(v) (1998).

44. 42 U.S.C. § 12111(10)(A). *See* Paul K. Longmore, *Disrespecting Disabilities*, 18



helpful guidelines in making the aforementioned Title I determinations, each case is determined individually.

## 2. Discrimination with Respect to Public Services Offered by Public Entities: Title II<sup>45</sup>

Title II of the ADA addresses public entities "and their responsibility to comply with the ADA's nondiscrimination standards."<sup>46</sup> In a sense, Title II "operationalises the concept of equality in the context of [public] services."<sup>47</sup> The Title II prohibition on discrimination stipulates that: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."<sup>48</sup> A "public entity" is (1) "any State or local government;"<sup>49</sup> (2) "any department, agency, special purpose district or other instrumentality of a State or States or local government;"<sup>50</sup> and (3) any "commuter authority."<sup>51</sup> To comply with the ADA, these entities must: "operate each service, program or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities."<sup>52</sup> Existing buildings "altered by, on behalf of, or for the use of a public entity . . . , [must] to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities . . . ."<sup>53</sup> Title II applies more exacting rules to new facilities constructed by public entities. Each new building must "be designed and constructed in such a manner that the facility is readily accessible to and usable by individuals with disabilities . . . ."<sup>54</sup>

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CAL. LAW. 48, 86 (1998) (discussing the cost of job accommodations, nearly 70% of which cost \$500.00 or less).

45. The Title II provisions took effect on January 26, 1992. See Pub. L. No. 101-336, § 205(a), 104 Stat. 327, 338 (1990) (codified at 42 U.S.C. § 12131).

46. Buhai, *supra* note 30, at 150.

47. QUINN ET AL., *supra* note 2, at 85.

48. 42 U.S.C. § 12132.

49. *Id.* § 12131(1)(A).

50. *Id.* § 12131(1)(B).

51. *Id.* § 12131(1)(C).

52. 28 C.F.R. § 35.150(a) (1998).

53. *Id.* § 35.151(b) ("[I]f the alteration was commenced after January 26, 1992.").

54. *Id.* § 35.151(a).

Title II does not require that all existing facilities be physically accessible, nor does it require any action that "would threaten or destroy the significance of an historic property."<sup>55</sup> Any action that a public entity demonstrates "would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. . ." is also not required.<sup>56</sup>

### 3. Discrimination with Respect to Public Accommodations, Services, and Amenities Offered by Private Entities: Title III<sup>57</sup>

Title III of the ADA applies to "privately funded 'public accommodations' and owners of 'commercial facilities affecting commerce.'"<sup>58</sup> A "place of public accommodation" is a facility owned, leased, leased to, or operated by a private entity<sup>59</sup> whose operations affect commerce.<sup>60</sup> All places of public

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55. *Id.* § 35.150(a)(1)–(2).

56. *Id.* § 35.150(a)(3).

57. The Title III provisions took effect on January 26, 1992. See Pub. L. No. 101-336, § 310(a), 104 Stat. 327, 365 (1990) (codified at 42 U.S.C. § 12181 (1994)).

58. Pond, *supra* note 29, at 15. Commercial facilities are facilities "(A) that are intended for non-residential use; and (B) whose operations will affect commerce." 42 U.S.C. § 12181(2)(A)–(B). The requirements for commercial facilities are more limited than the requirements for public accommodations. Compare 42 U.S.C. § 12183 (requiring that commercial facilities merely ensure that new construction and alterations are accessible) with 42 U.S.C. § 12182 (imposing extensive obligations on places of public accommodation).

59. See 42 U.S.C. § 12182(a).

60. See *id.* § 12181(7). The term "commerce" means "travel, trade, traffic, commerce, transportation, or communication—(A) among the several States; (B) between any foreign country or any territory or possession and any State; or (C) between points in the same State but through another State or foreign country." 42 U.S.C. § 12181(1). Private entities are considered public accommodations if the operations of such entities affect commerce that falls into one of twelve categories:

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider,

accommodation must comply with Title III because unlike Title I, Title III makes "no allowance . . . for the smallness of the covered entity."<sup>61</sup>

Public accommodations must not provide different or separate goods, services, or facilities to individuals with disabilities "unless differentiation or separation are required to provide truly equal opportunity."<sup>62</sup> In addition, public accommodations may not require that individuals with disabilities participate in separate programs if they prefer to participate in equivalent programs provided for other individuals.<sup>63</sup> Where necessary, Title III entities must make "reasonable modifications" to policies, practices, and procedures to allow individuals with disabilities to fully enjoy facilities, services, privileges, advantages, and accommodations.<sup>64</sup>

hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

*Id.* § 12181(7)(A)-(L).

61. QUINN ET AL., *supra* note 2, at 98. Compare Title III, 42 U.S.C. § 12181(7) (applying to all private entities whose operations affect commerce) with Title I, 42 U.S.C. § 12111(5)(A) (applying only to employers with 15 or more employees).

62. Pond, *supra* note 29, at 15 (referring to the ADA's "separate benefit" provision, 42 U.S.C. § 12182(b)(1)(a)(iii)).

63. See 42 U.S.C. § 12182(b)(1)(B)-(C). "[A]ccommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual." *Id.* § 12182(b)(1)(B). "Notwithstanding the existence of separate or different programs or activities . . . , an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different." *Id.* § 12182(b)(1)(C).

64. See *id.* § 12182(b)(2)(A)(ii). The "specific prohibition" on discrimination includes:

a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods services, facilitates, privileges, advantages, or accommodations . . . .

*Id.* Thus, such modifications will generally be deemed reasonable unless they are so drastic as to "require the public accommodation to significantly alter the nature of its business." Pond, *supra* note 29, at 15 (footnote omitted).

Title III public accommodations must provide appropriate auxiliary aids and services to ensure that communication with individuals with disabilities is as effective as with other individuals.<sup>65</sup> Existing structural barriers must be removed to the extent that such removal is “readily achievable.”<sup>66</sup> All newly constructed facilities, as well as all areas of existing buildings that undergo remodeling,<sup>67</sup> must be accessible to individuals with disabilities to the “maximum extent feasible.”<sup>68</sup>

Under Title III, discrimination arises when public accommodations:

impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability . . . from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.<sup>69</sup>

Although a public entity may impose legitimate safety requirements that are necessary for safe operation, it may only impose such requirements when they are based on “actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.”<sup>70</sup> Title III does not apply where the

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65. See Pond, *supra* note 29, at 15.

66. Removal of a structural barrier is “readily achievable” if it is “easily accomplishable and able to be carried out without much difficulty or expense.” 42 U.S.C. § 12181(9).

67. These provisions apply to buildings that undergo remodeling after Title III took effect on January 26, 1992. See *id.* § 12181.

68. 28 C.F.R. § 35.151(b) (1998). Making physically altered portions of buildings accessible to individuals with disabilities will be deemed “feasible” unless the “cost and scope of such alterations is disproportionate to the cost of the overall alteration.” *Id.* § 36.403(a). When physical alterations of buildings are undertaken, providing an accessible path of travel for individuals with disabilities may include: “widening doorways or installing ramps;” *id.* § 36.403(f)(2)(i); “making restrooms accessible;” *id.* § 36.403(f)(2)(ii); relocating telephones to “an accessible height;” *id.* § 36.403(f)(2)(iii); and relocating “inaccessible drinking fountain[s];” *id.* § 36.403(f)(2)(iv).

69. 28 C.F.R. § 36.301(a).

70. *Id.* § 36.301(b). Examples of safety qualifications that are necessary to the safe operation of a public accommodation “that would be justifiable in appropriate circumstances would include height requirements for certain amusement park rides or a requirement that all participants in a recreational rafting expedition be able to meet a necessary level of swimming proficiency.” 28 C.F.R. pt. 36 app. B § 36.301 (1998).

risks associated with the individual pose a "direct threat to the health and safety of others."<sup>71</sup>

Collectively, the ADA's titles represent revolutionary steps in the fight to end disability discrimination. Legislative design flaws and judicial misinterpretation, however, have brought the United States' progress to a standstill. Unless remedied, these impediments will preclude the ADA from fully achieving its purpose.<sup>72</sup>

### III. DISABILITY DISCRIMINATION LEGISLATION IN AUSTRALIA

Although some general anti-discrimination legislation appeared in Australia at the state level as early as 1966,<sup>73</sup> the Australian Commonwealth Government made no attempt to control discrimination, of any kind, until the mid-1970s.<sup>74</sup> Thereafter, a majority of Australian states followed the national legislature by implementing state anti-discrimination laws.<sup>75</sup> These early state laws primarily addressed race and sex discrimination.<sup>76</sup> Today, virtually all Australian state anti-discrimination laws also cover the issue of "discrimination on grounds of disability."<sup>77</sup> The state laws, however, were neither "sufficient, by themselves, to eliminate discrimination nor . . . [adequate] to provide complainants with complete redress."<sup>78</sup> Thus, in keeping with the "global movement for human rights or civil liberties,"<sup>79</sup> the Australian Commonwealth designed the DDA to "fill gaps"<sup>80</sup> in many of the existing state laws with respect

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71. 28 C.F.R. § 36.208(a). A "direct threat" is "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." *Id.* § 36.208(b).

72. See *infra* Part IV.D (discussing the ADA's weaknesses).

73. See, e.g., Prohibition of Discrimination Act, 1966 (S. Austl.) (prohibiting race discrimination in Southern Australia).

74. See, e.g., Racial Discrimination Act, 1975 (Austl.); Sex Discrimination Act, 1984 (Austl.).

75. Examples of Australian state anti-discrimination laws enacted from 1977 to 1991 include: Anti-Discrimination Act, 1977 (N.S.W.); Equal Opportunities Act, 1984 (Vict.); Equal Opportunities Act, 1984 (S. Austl.); Anti-Discrimination Act, 1991 (Queensl.).

76. See, e.g., Prohibition of Discrimination Act, 1966 (S. Austl.).

77. QUINN ET AL., *supra* note 2, at 123.

78. Melissa Conley Tyler, Law and Change, *The Disability Discrimination Act 1992: Genesis, Drafting and Prospects*, 19 MELB. U. L. REV. 211, 217 (1993).

79. *Id.* at 215.

80. QUINN ET AL., *supra* note 2, at 124. See also Caroline Milburn, *Australia: A Mission to Outlaw Bias Against Disabled*, AGE (Melbourne), Feb. 27, 1993, at 4.

to disability issues. Modeled in part after the ADA,<sup>81</sup> the DDA appears, on its face, to equal or even surpass the ADA's comprehensiveness. Upon close examination, however, it is clear that behind the thin veneer of its inclusive vocabulary, the DDA's implementation has been largely ineffective.<sup>82</sup>

### *The Australian Disability Discrimination Act*<sup>83</sup>

The DDA represents the Australian Commonwealth's first legislative effort dealing exclusively with the problem of disability discrimination.<sup>84</sup> Upon enactment, the DDA's objectives were: (a) "to eliminate, as far as possible, discrimination against persons on the ground of disability . . . ;"<sup>85</sup> (b) "to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community;"<sup>86</sup> and (c) "to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community."<sup>87</sup>

Although the Human Rights and Equal Opportunity Commission (HREOC) modeled the DDA loosely after the ADA,<sup>88</sup> when drafting the DDA,<sup>89</sup> the HREOC "expressly

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81. See Tucker, *supra* note 12, at 15.

82. See *infra* Parts IV.B.1-5 (discussing the DDA's weaknesses).

83. The DDA "commenced operation" on March 1, 1993. Juliet Bourke, *Mental Illness, Discrimination in Employment and the Disability Discrimination Act 1992 (Cth.)*, 3 J.L. & MED. 318, 324 (1996).

84. Section 5 of the DDA defines "discrimination" as follows:

(1) [A] person (discriminator) discriminates against another person (aggrieved person) on the ground of a disability . . . if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favorably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.

(2) [C]ircumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability.

DDA, 1992, § 5(1)-(2) (Austl.) (internal quotation marks omitted).

85. DDA § 3(a). Section 3(a) of the DDA provides specifically for the elimination of disability discrimination in the following areas: "(i) work, accommodation, education, access to premises, clubs and sport; and (ii) the provision of goods, facilities, services and land; and (iii) existing laws; and (iv) the administration of Commonwealth laws and programs . . ." *Id.* § 3(a)(i)-(iv).

86. *Id.* § 3(b).

87. *Id.* § 3(c).

88. See Bonnie Poitras Tucker, *A Time for Action*, 69 L. INST. J. 539, 539 (1995).

89. See QUINN ET AL., *supra* note 2, at 128 (noting that the DDA's definition closely adheres to the recommendations in the HREOC's Draft Position Paper).

rejected" some of the ADA's language.<sup>90</sup> Presumably, in rejecting the ADA's restrictive language, the Commission intended the DDA to apply to many groups of individuals with disabilities, including those excluded by the ADA.

The DDA's broad language prohibits discrimination against individuals with physical disabilities, intellectual disabilities, mental illnesses and mental diseases.<sup>91</sup> It also forbids discrimination against people who use palliative and therapeutic devices and aids, interpreters, readers and assistants, and service animals.<sup>92</sup> The Australian legislature "incorporate[d] the United States' concept of 'unjustifiable hardship' within the [DDA's] definition of disability discrimination."<sup>93</sup> Therefore, as with the ADA, employers can use the "unjustifiable hardship" defense to render disability discrimination lawful, provided the employer demonstrates that providing accommodation would create such hardship.<sup>94</sup>

As enacted, the DDA had great potential to provide protections for Australians with disabilities.<sup>95</sup> Unfortunately, in some circumstances the DDA's implementation has been wholly ineffective.<sup>96</sup> Although the DDA's language was carefully crafted with the promise of ensuring that all Australians with disabilities are protected against discrimination, the Australian legislature failed to create the type of legislation that can live up to that promise.

#### IV. THE STRENGTHS AND WEAKNESSES OF THE DDA AND THE ADA: COMPARING THE SUCCESSES AND INADEQUACIES

The DDA and the ADA were enacted under entirely different circumstances.<sup>97</sup> The differences in the creation, enactment, and enforcement of the two laws significantly impact their relative effectiveness.<sup>98</sup> The ADA's enactment was the result

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90. *Id.* Specifically, the HREOC rejected the ADA's disability definition because it deemed the definition unnecessarily difficult and underinclusive. *See generally id.*

91. For the DDA "disability" definition, see *supra* note 9.

92. *See* QUINN ET AL., *supra* note 2, at 137 (citing the DDA, 1992, §§ 7-9 (Austl.)).

93. Tyler, *supra* note 78, at 221.

94. *See generally id.*

95. *See* Tucker, *supra* note 12, at 21.

96. *See infra* Parts IV.B.1-5 (discussing the DDA's ineffective implementation).

97. *See generally* Tucker, *supra* note 88, at 540.

98. *See generally id.*

of the efforts of people with disabilities "and their advocates throughout the United States."<sup>99</sup> The motivation and driving force underlying the ADA's passage began at "the grass roots level," entailed heavy involvement from specific interest groups, and in turn, was widely publicized.<sup>100</sup> In contrast, the Australian Commonwealth initiated and passed the DDA with little or no public attention,<sup>101</sup> fanfare, or participation by the disability community.<sup>102</sup> Hence, the Australian public "was, and still is, generally unaware of the law."<sup>103</sup>

In the United States, because the public has historically been exposed to civil rights legislation, it is therefore equipped with a collective consciousness that recognizes civil rights legislation as a means for providing equality to disadvantaged groups.<sup>104</sup> Conversely, the Australian public, for the most part, is without such an understanding.<sup>105</sup> In Australia, legislation such as the DDA is widely viewed "as a form of charity, rather than a necessary means of providing equal rights."<sup>106</sup> The continued existence of this attitude, which "defines the disab[ility] [community] as 'deserving poor' who are dependent [on] the state through no fault of their own,"<sup>107</sup> undoubtedly hinders the DDA's performance. It is precisely this type of ignorance that the DDA's goals of recognizing and promoting equality<sup>108</sup> seek to eliminate.

The distinctions in "the manner in which the two laws were passed is significant for three primary reasons."<sup>109</sup> First, in addition to negotiating in an environment that *patronizes* disability rights, Australians with disabilities "and their advocates will be in the awkward position of having to negotiate and compromise with respect to the promulgation of standards *after* the DDA's enactment."<sup>110</sup> In contrast, the disability community in the United

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99. *Id.* at 539.

100. *See id.* at 539-540.

101. *See* Tyler, *supra* note 78, at 227. "[T]he minimal coverage preceding the proclamation of the [DDA] . . . [evidences the media's lack of concern with disability issues, and] . . . is perhaps symptomatic of a wider disregard." *Id.*

102. *See generally* Tucker, *supra* note 88, at 540.

103. *Id.*

104. *See id.*

105. *See id.*

106. *Id.*

107. Tyler, *supra* note 78, at 215 (footnote omitted).

108. *See* DDA, 1992, § 3(c) (Austl.).

109. Tucker, *supra* note 88, at 540.

110. *Id.*



States played an important role in the ADA's negotiation and creation, in all stages of the legislative process.<sup>111</sup>

Second, the HREOC is poorly funded and "place[s] little emphasis upon resolution of [the few] disability complaints" that it receives.<sup>112</sup> The Australian Commonwealth worsens this complacency, because "having passed the DDA, [it now] seems singularly uninterested in enforcing the Act."<sup>113</sup> By comparison, the ADA's enforcement agencies fiercely mandate adherence to ADA standards.<sup>114</sup>

Finally, in the United States, Congress afforded federal agencies one year to develop ADA implementation regulations.<sup>115</sup> Conversely, the Australian Commonwealth set no guidelines or time requirements for drafting DDA compliance standards; furthermore, "the Disability Commissioner and her staff estimate that it will be several years before this [task] is accomplished."<sup>116</sup>

### A. The DDA's Strengths

#### 1. A Comprehensive Disability Definition

The DDA's most notable strength is its broad, inclusive disability definition.<sup>117</sup> Designed to ensure that "no one should 'fall through the gaps,'"<sup>118</sup> the DDA's definition of "disability" is "by far the broadest of any yet offered in an anti-discrimination statute."<sup>119</sup>

The HREOC sought to include within the DDA's protected classes people whose "disability relates to physical disfigurement, rather than loss of any functional capacity and who are not limited in any major life activities but who are nonetheless discriminated

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111. See generally *id.*

112. *Id.*

113. *Id.*

114. For the ADA Accessibility Requirements, see ADA Accessibility Guidelines for Buildings and Facilities, 28 C.F.R. pt. 36, app. A (1998).

115. See Tucker, *supra* note 88, at 541.

116. *Id.*

117. The DDA's expansive disability definition may be overbroad. Traditional concerns regarding broadly defined protected classes generally focus on the high implementation costs and increased litigation that may result. These concerns, however, are almost impossible to gauge in Australia because so few DDA complaints have been filed. See discussion *infra* note 181.

118. Tyler, *supra* note 78, at 220.

119. *Id.*

against because of prejudice.”<sup>120</sup> The HREOC also intended to provide DDA protection for people who have “overcome any loss of capacity (through their own efforts, with or without any assistance and the use of aids or appliances) . . . .”<sup>121</sup> The Commission emphasized that “the need for protection against discrimination does not disappear as a person becomes more able to participate in the community.”<sup>122</sup>

It is questionable whether a person seeking “the assistance of anti-discrimination law [and] asserting their ability and entitlement to participate equally may paradoxically find it necessary to argue that their ability to participate fully is in fact limited by their impairment in order to qualify for protection under the law.”<sup>123</sup> The DDA’s drafters recognized the circular nature of this approach and accordingly rejected the ADA’s “substantial limitation” language.

## 2. Making Reasonable Adjustments to Accommodate Employees with Disabilities

Although the DDA does not expressly contain the terms “reasonable accommodations” and “reasonable adjustments,”<sup>124</sup> the terms are commonly used to describe the obligations imposed on employers in the DDA’s employment discrimination sections.<sup>125</sup> Accordingly, any employer who fails to make “reasonable adjustments” to accommodate an employee with a disability will “be exposed to liability for unlawful discrimination, even if he or she acted in good faith.”<sup>126</sup>

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120. QUINN ET AL., *supra* note 2, at 128.

121. *Id.*

122. *Id.* at 128 & n.26 (quoting HREOC Draft Position Paper, at 90).

123. *Id.* at 128.

124. The DDA’s “reasonable adjustments” concept is similar to the ADA’s Title I “reasonable accommodations” provision. See 42 U.S.C. § 12111(8). For a discussion of the ADA “reasonable accommodations” provision, see *supra* Part II.A.1.

125. See Bourke, *supra* note 83, at 327. See also, e.g., McNeill v. Australia, No. H94/79, sec. 2.1, para. 1 (unreported HREOC June 26, 1995) (Austl.) available at (visited Sept. 23, 1999) <<http://www.hreoc.gov.au/cgi-bin/programs/view.cgi>> (explaining that a reasonable adjustment is “any form of assistance or adjustment that is necessary, possible and reasonable to make to working arrangements, work methods, equipment or the work environment to reduce or eliminate the effects of disabilities.” (citation omitted)).

126. Statement by the Disability Discrimination Commissioner; Bourke, *supra* note 83, at 329 n.49 and accompanying text (citation omitted).

The HREOC's decision in *McNeill v. Australia*<sup>127</sup> illustrates the DDA "reasonable adjustments" notion. McNeill, an individual with a visual impairment, was an employee of the Australian Department of Social Security (Department).<sup>128</sup> During the probationary period of McNeill's employment, the Department only made marginal accommodations for her disability.<sup>129</sup> When McNeill's probationary period expired, the Department terminated her employment.<sup>130</sup> The Department contended that McNeill's dismissal was the result of "poor conduct, communication and interpersonal skills that were unrelated to the fact that her equipment was not fully available and functioning . . . ." <sup>131</sup> The behaviors criticized by the Department, however, such as McNeill's "tendency to interrupt people and make frequent demands of supervisors, are directly attributable . . . to [her] disability and the mode of behavior she has adopted over the years to compensate for her limited sight."<sup>132</sup> The HREOC held that much of McNeill's behavior "reflected her frustration at her disability not being reasonably accommodated by the [Department] . . . ." <sup>133</sup> Thus, the Commission held that McNeill's termination was unlawful because it "was brought about by . . . her disability—namely, . . . for displaying behavior that was a manifestation of her disability."<sup>134</sup>

The DDA's "reasonable adjustments" provision is far from perfect.<sup>135</sup> The *McNeill* interpretation of the provision, however, which implies that an employer cannot fire an employee because

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127. No. H94/79 (unreported HREOC).

128. See *id.* sec. 1, para. 1. Although McNeill's disability rendered her legally blind, with "the provision of special equipment, . . . there was no doubt that she had the capacity to do the work." *Id.* sec. 2, paras. 6–7.

129. See *id.* sec. 1, para. 4, sec. 2, paras. 11–12, 14. To accommodate McNeill's visual impairment, her employer initially supplied her with equipment. See generally *id.* sec. 2.2, paras. 1–4. The equipment, however, was not sufficient to adequately accommodate her disability and often did not function properly. See *id.*

130. See *id.* sec. 1, para. 4.

131. *Id.* sec. 3, para. 6.

132. *Id.*

133. *Id.*

134. *Id.* sec. 3, para. 7. The Department intensely monitored McNeill's job performance; prior to one of her probation evaluations, a personnel employee even "sat beside her on a full-time basis for two weeks . . . ." *Id.* sec. 2.4, para. 17.

135. See *infra* Part IV.B.5 (discussing the weaknesses in the DDA's "reasonable adjustments" notion).

of the employee's disability, is an encouraging sign that judicial interpretation of the DDA is moving in the right direction.

### *B. The DDA's Weaknesses*

Because of the Australian public's unfamiliarity with the DDA's requirements and implications, case law interpreting and applying the Act is insubstantial. There are, however, some decisions that provide a preliminary understanding of the Act's effectiveness.

#### 1. Performing the Inherent Requirements of an Employment Position: an Essential Element in Qualifying for DDA Protection

Like the United States, Australia has been forced to address the Acquired Immune Deficiency Syndrome (AIDS) and Human Immunodeficiency Virus (HIV) epidemic and its relation to discrimination disability legislation.<sup>136</sup> A revolutionary disability definition is meaningless if proper implementation and interpretation do not accompany it. The method Australian courts use to deal with HIV and AIDS illustrates this axiom.

At issue in *X v. Department of Defence*<sup>137</sup> was whether the Department of Defence's discharge of X, a soldier who tested HIV positive, unlawfully violated the DDA.<sup>138</sup> Until his discharge, X worked as a signalman for the Australian Defence Forces (ADF).<sup>139</sup> X signed a pre-enlistment medical history questionnaire acknowledging that he would be tested for HIV and other diseases as a part of the ADF's "post-entry medical check" procedure.<sup>140</sup> When the tests revealed that X was HIV positive,

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136. For the DDA provisions addressing AIDS (DDA, 1992, § 4(c) (Austl.) the presence of organisms "causing disease or illness") and HIV (DDA §4(d) the presence of organisms "capable of causing disease or illness"), see *supra* note 9.

137. No. H94\98 (unreported HREOC June 29, 1995) (Austl.) *available at* (visited Sept. 23, 1999) <<http://www.hreoc.gov.au/cgi-bin/programs/view.cgi>> [hereinafter *Department of Defence Case I*], *aff'd sub nom* by Australia v. Human Rights & Equal Opportunity Comm'n, No. BC9605184, 1996 Aust. Fedct. LEXIS 859 (Austl.) [hereinafter *Department of Defence Case II*], *vacated*, (1998) 152 A.L.R. 182 (Austl.) [hereinafter *Department of Defence Case III*]. See generally *Fed: Bishop Says HIV Soldier Would Not be Deployable*, AUSTRALIAN ASSOCIATED PRESS (AAP) NEWSFEED (Sydney), Jan. 14, 1998, *available in* LEXIS, Aust Library, Aapnew File.

138. See *Department of Defence Case I*, No. H94\98 sec. 1, para. 2; for a discussion of other cases involving HIV and AIDS discrimination by the ADF, see Gareth Boreham, *Australia: AIDS Officers Claim Unfair Treatment*, AGE (Melbourne), Oct. 5, 1994, at 5.

139. See *Department of Defence Case I*, No. H94\98 sec. 3, para. 3.

140. *Department of Defence Case II*, 1996 Aust. Fedct. LEXIS 859 at \*3-4. The

the ADF discharged him.<sup>141</sup> At the time of his discharge, X was in "apparent good health and symptom free."<sup>142</sup>

HIV is a *per se* disability under the DDA.<sup>143</sup> The ADF conceded that it had discriminated against X on the basis of his disability, but argued that the discrimination was not unlawful because X could not perform the inherent requirements of his position, namely "undertake all necessary basic training as a soldier and thereafter be able to be deployed as required."<sup>144</sup> The ADF argued that the ability to be "deployed as required" was an *inherent requirement* of ADF employment,<sup>145</sup> and that a soldier with an HIV infection could not be deployed because of the "risk of injury whereby the soldier may discharge bodily fluid, including blood, exposing other members of the ADF to risk of infection."<sup>146</sup> In response, X submitted that the "requirement that a soldier be HIV free was *not* an *inherent* requirement of employment . . ." as an ADF soldier.<sup>147</sup> Rather, it was an *external* requirement imposed by the ADF, in the absence of which X was

medical procedure was conducted in accordance with an ADF Service Policy designed to detect, prevent, and manage HIV, which provides: "All regular entrants are to be tested as soon as possible after arrival at the initial training establishment. . . . [P]ersonnel with HIV infection are to be discharged." *Id.* at \*4.

141. See *Department of Defence Case I*, No. H94\98 sec. 3, para. 6.

142. *Department of Defence Case II*, 1996 Aust. Fedct. LEXIS 859 at \*4.

143. See DDA, 1992, § 4(c)-(d) (Austl.). For the DDA "disability" definition, see *supra* note 9.

144. *Department of Defence Case II*, 1996 Aust. Fedct. LEXIS 859 at \*13.

145. *Id.* As defined by the DDA, discrimination against an employee on the grounds of disability, is *not* unlawful if, considering the current employee's past training, qualifications and experience, performance as an employee, and all other reasonable factors, the employee, because of his or her disability:

(a) would be unable to carry out the *inherent requirements* of the particular employment; or

(b) would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an *unjustifiable hardship* on the employer.

DDA § 15(4)(a)-(b) (emphases added).

146. *Department of Defence Case II*, 1996 Aust. Fedct. LEXIS 859 at \*13. In support of the ADF's deployment-is-an-inherent-requirement-theory, the ADF further submitted that "HIV-positive soldiers could not give direct emergency blood transfusions in the field . . .," as is sometimes required. *Id.* On the ADF's "very compassionate [HIV and AIDS] polic[ies]," ADF Spokesman, Brigadier Adrian D'Hage, said that the ADF "would continue to employ [soldiers] until [they a]re unfit for work. . ." despite the fact that the ADF immediate-dismissal-upon-diagnosis-policy dictates a contrary result. Boreham, *supra* note 138, at 5.

147. *Department of Defence Case II*, 1996 Aust. Fedct. LEXIS 859 at \*13 (emphasis added); for the DDA "inherent requirement" definition, see *supra* note 145.

“completely capable of carrying out all the functional requirements of the employment as a soldier, including deployment.”<sup>148</sup>

The HREOC construed the DDA’s inherent requirement exemption narrowly, holding that “there must be a clear and definite relationship between the inherent or intrinsic characteristics of the employment and the disability in question. . . .”<sup>149</sup> The Commission rejected the ADF’s suggestion that “all persons who tested [HIV] positive . . . could, as a class, be excluded from employment merely because each person had the characteristic that he or she had returned a positive test.”<sup>150</sup> As a result, the HREOC found that the constraints on X’s deployability arose “not because of the physical consequences of the disability . . . , but because of an externally imposed requirement of the [ADF Policy] . . . .”<sup>151</sup> Although deployability was an “*incident of employment*,” the HREOC held that it was not an “*inherent requirement*” of the position,<sup>152</sup> and therefore, the ADF’s dismissal of X was unlawful.<sup>153</sup> The HREOC’s conclusion thereby reflects a heightened sensitivity concerning disability discrimination.

Acting retrogressively, however, an Australian federal court overturned HREOC’s holding in *X v. Department of Defence*.<sup>154</sup> The court found that the case revolved around bleeding safely, “in the sense that there be no significant risk to others . . . of HIV infection,”<sup>155</sup> and thus remitted the case back to the HREOC for “further consideration as to the inherent requirements of the particular employment . . . .”<sup>156</sup>

The HREOC’s decision in *X v. Department of Defence* suggests that an employer may not arbitrarily dismiss an employee because of the employee’s medical condition when the condition is unrelated to the inherent requirements of the employment

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148. *Department of Defence Case II*, 1996 Aust. Fedct. LEXIS 859 at \*14.

149. *Department of Defence Case I*, No. H94\98, sec. 5, para. 15. The HREOC Commissioner provided the following example: “if the ‘inherent requirements’ of a job . . . required the employee to use both hands, then clearly . . . [a person with one arm would be unable] to carry out the inherent requirements of the employment.” *Id.* sec. 5, para. 5.

150. *Department of Defence Case II*, 1996 Aust. Fedct. LEXIS 859 at \*14.

151. *Department of Defence Case I*, No. H94\98, sec. 5, para. 7.

152. *Id.* sec. 5, paras. 15–16.

153. *See id.* sec. 5, para. 26.

154. *See Department of Defence Case III* (1998) 152 A.L.R. 182, 218 (Austl.).

155. *Id.*

156. *Id.*

position.<sup>157</sup> It logically follows that an "employer could not legally dismiss an employee for failing to disclose an irrelevant item of medical history, that is, one which does not relate to the inherent requirements of the position."<sup>158</sup> Pursuant to *O'Callahan-Evans v. Mitsubishi Motors Australia Ltd.*,<sup>159</sup> employers may, however, "dismiss employees who forget to disclose part of their medical history in their pre-employment questionnaires . . ."<sup>160</sup> To exercise this power, an employer need only claim that the undisclosed medical history relates to the inherent requirements of the position.<sup>161</sup>

When the *O'Callahan-Evans* plaintiff applied for a job at a paint shop, she failed to disclose a previous arm injury in a medical history form and during a pre-employment medical examination.<sup>162</sup> The employer's doctor testified that, had he been aware of her medical history, "he would not have recommended her for employment because . . . there was a high likelihood of her developing carpal tunnel syndrome because of her history."<sup>163</sup>

After commencing her employment duties, which involved repetitive movement, *O'Callahan-Evans* experienced discomfort in her arm and hands.<sup>164</sup> Following a medical examination, the company's doctors diagnosed her with carpal tunnel syndrome.<sup>165</sup> Although the Industrial Relations Court accepted that *O'Callahan-Evans* did not "*deliberately* mislead" her employer, the court nevertheless found that the employer possessed a valid reason for terminating her upon discovering her medical history.<sup>166</sup> The court held that "the employer has the right to terminate the [a]pplicant's employment for reasons which essentially relate to its operational requirements, and the right to choose employees who are best suited to the work at hand."<sup>167</sup>

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157. See *Department of Defence Case I*, No. H94\98, sec. 5, para. 15.

158. Joe Catanzariti, *Employment Discrimination or Employee Duty?*, 34 L. SOC'Y J. 20, 20 (1996).

159. No. 1173 SA (950482) (unreported Indus. Rel. Ct. Sept. 18, 1995) (Austl.) available at (visited Sept. 21, 1999) <<http://www.austlii.edu.au>>.

160. Catanzariti, *supra* note 158, at 20.

161. See generally *id.*

162. See *O'Callahan-Evans*, No. 1173 SA, paras. 4-5.

163. *Id.* para. 13.

164. See *id.* paras. 7-9.

165. See *id.* para. 9.

166. *Id.* paras. 20-22 (emphasis added).

167. *Id.* para. 24.

Although the DDA supposedly prevents employment discrimination against individuals with disabilities, it apparently allows employers the freedom to remove employees with disabilities from the hiring pool. If the DDA permits employers to reject job applicants based on subjective beliefs that the individuals (without accommodations) may not be "best suited," the DDA's goal of ensuring that "persons with disabilities have the same rights to equality"<sup>168</sup> as the rest of the community, will be unattainable.

## 2. Attitudinal Obstacles and Implementation Difficulties Continue to Severely Hinder the DDA's Progress

Problems with implementing the DDA are partially attributable to Australian attitudes about disability issues.<sup>169</sup> By dealing with disability discrimination in the same way it deals with sex and race discrimination,<sup>170</sup> the Australian legislature floundered. To explain, Australia's approach to race and sex discrimination treats "the factor in question (race, sex, disability, etc.) . . . as irrelevant."<sup>171</sup> This approach may effectively address race and sex discrimination issues; however, "requiring a . . . person [with a disability] to comply with requirements in the same way as an able-bodied person does can itself amount to discrimination."<sup>172</sup> By employing a "comparability requirement," the DDA may "exclude people from the protection of the legislation at the initial stage without allowing them the opportunity to reach the stage of arguing that the accommodation required is reasonable . . . ."<sup>173</sup>

By comparison, most of the legislation enacted in recent years takes an approach opposite to the DDA's comparability approach, and keeps disability legislation "separate from the body of 'ordinary' anti-discrimination law."<sup>174</sup> The DDA is physically separate from the rest of Australia's general discrimination

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168. DDA, 1992, § 3(b) (Austl.).

169. See generally Tucker, *supra* note 88.

170. See generally QUINN ET AL., *supra* note 2, at 130.

171. *Id.*

172. *Id.*

173. *Id.* at 131.

174. Dr. Gerard Quinn, *Legislation on Disabled Should be Kept Separate from Anti-Discrimination Law*, IRISH TIMES (Dublin), May 19, 1997, para. 6, available at (visited Sept. 24, 1999) <<http://www.ireland.com/newspaper/ireland/1997/0519/hom18.htm>>.



legislation, yet it utilizes the same approach.<sup>175</sup> According to Dr. Gerard Quinn, an authority on anti-discrimination legislation, the justification for separate legislation is that "although the ultimate goals (equality) [of race, sex and disability discrimination legislation] are the same, the means used [to reach those goals] tend to be quite different."<sup>176</sup>

The purpose of disability legislation, says Quinn, "is not to catch all and sundry[,] but to dismantle barriers actually faced by people with disabilities."<sup>177</sup> The Australian legislature is unlikely to level the playing field for individuals with disabilities if its legislative approach renders the protections impossible to obtain.

### 3. Meager, Deficient, and Often Non-existent Guidelines for DDA Compliance and Enforcement

Establishing enforcement regulations and guidelines is of paramount importance for the successful implementation of any legislation. The "success or failure of [an act] literally *depends* on formulation of adequate standards"<sup>178</sup> that serve not only to ensure compliance with the statute, but also to alert the public as to whom the statute applies.<sup>179</sup> Few regulations exist to inform the Australian public about the DDA's implications, to instruct them on methods of compliance, or to alert them of the Act's existence.<sup>180</sup> Many people to whom the DDA applies are, consequently, unaware of the protections to which they are entitled.<sup>181</sup> Moreover, many entities that are required to

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175. See generally *id.* paras. 5-6.

176. *Id.* para. 8. Further, "[t]he intellectual structure of ordinary anti-discrimination legislation law makes it ill-suited to accommodate a disability perspective." *Id.* para. 11.

177. *Id.* para. 22.

178. Tucker, *supra* note 88, at 539 (emphasis added).

179. See generally *id.*

180. The DDA contains no provision mandating the formulation of compliance regulations. Compare DDA, 1992, § 31(1) (Austl.) (providing that administrative agencies "may formulate standards, to be known as disability standards . . .") (emphasis added) with 42 U.S.C. § 12134 (1994) (stipulating that "[n]ot later than [one] year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement [Title II].") (emphasis added).

181. Indicative of the Australian public's general unawareness of the DDA's implications is the fact that during the first year following the DDA's enactment, the HREOC Commissioner received only 220 complaints in all disability discrimination areas. See Tucker, *supra* note 88, at 540. In comparison, in the year following the ADA's enactment, the EEOC received over 16,000 complaints in the employment area alone. See *id.*

accommodate individuals with disabilities are either ignorant of their obligations, or unsure of what DDA compliance entails.

#### 4. Continued Inaccessibility to Australian Buildings and Services

Because of the DDA's virtual non-enforcement and sparse implementation regulations, there are significant access problems in Australia in that, people with disabilities are physically unable to access buildings and services. Currently, there is "no single standard for office towers, shopping centers, or industrial facilities to be deemed disability compliant, and owners, managers, and councils [remain] unsure of what [is] required."<sup>182</sup>

Changes to the Australian building code, "which would bring it into line with the [DDA, have been] proposed to improve disability access."<sup>183</sup> Unfortunately, because of industry concerns about costs, a "concerted campaign by property owners . . ." delayed the proposed changes.<sup>184</sup> These changes would only apply to new buildings and major refurbishments of existing buildings.<sup>185</sup> The proposed Australian building code is considerably less stringent than the ADA design standard, which requires modification of many existing buildings.<sup>186</sup> Nevertheless, Australian property owners will not implement a new building code without a fight.<sup>187</sup>

This reluctance to alter Australian public facilities and buildings (and thereby comply with the DDA) results in continued inaccessibility for Australians with disabilities. Many Australian courthouses illustrate these accessibility problems. For example,

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182. Lisa Allen, *PCA Ire Over Delay on Disabled Standards*, AUSTL. FIN. REV. (Sydney), May 28, 1998, at 45.

183. *Plan to Help Disabled Delayed*, COURIER-MAIL (Brisbane), May 15, 1998, available in 1998 WL 9715403.

184. *Id.*

185. *See id.*

186. For a discussion on the ADA Title III Accessibility Requirements, see *supra* text accompanying notes 64-68.

187. *See Australian Building Codes Board: The ABCB Initiative on Access to Buildings for People with Disabilities*, M2 PRESSWIRE, May 4, 1998, available in 1998 WL 11309960 (remarking that, on May 4, 1998, six years after the DDA's enactment, the Australian Buildings Codes Board issued a statement confirming that it would, in the immediate future, publish a document on building access). *But see* Paddy Manning, *Disabled Access Law Rewritten*, AUSTRALIAN (Sydney), May 7, 1999, at 33 (recognizing that in early May 1999, the Australian Attorney General announced Australia's "intention to amend the [DDA] to allow for a mandatory disability standard . . . that would replace the existing complaint-driven enforcement process on access to premises . . .").

the New South Wales courthouse, wherein DDA matters are decided, is wheelchair inaccessible.<sup>188</sup>

Accessibility obstacles for individuals with disabilities also plague Australia's tourist attractions. Inaccessible toilets, lack of signs, and narrow doorways are prevalent at many of Australia's national landmark buildings.<sup>189</sup> Additionally, entertainment venues are often inaccessible for individuals with disabilities. In a recent HREOC decision, a movie theater discriminated against individuals with disabilities by "making the complex available to them only . . . [if] they could use the stairways or be carried up them."<sup>190</sup> The HREOC held that the discrimination was unlawful and ordered the theater to install stairlifts within five years.<sup>191</sup>

Access to Australia's public services is yet another problem for individuals with disabilities. An ironic example of Australian access problems is illustrated in an incident wherein Australia's Disability Discrimination Commissioner, Elizabeth Hastings, was late for a press conference because Total Mobility, the taxi service for people with disabilities, arrived thirty-five minutes late.<sup>192</sup> When Ms. Hastings complained about the delay, Total Mobility told her that "special taxis were often late."<sup>193</sup> Total Mobility charged Ms. Hastings twice the normal rate for her taxi ride because she required a "special taxi."<sup>194</sup> Upon learning of the incident, Wellington's Regional Council's Public Transport Planning Manager stated that "the Council was aware the [taxi] service might not have enough vehicles . . . however, there was no hard evidence that the service was inadequate and [the Council had not received] much feedback from customers."<sup>195</sup> The Planning Manager added that the Council would respond if it received complaints.<sup>196</sup>

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188. See Matt Laffan, *What the Disability Discrimination Act Means for Solicitors*, 33 L. SOC'Y J. 42, 42 (1995).

189. Kirsten Lawson, *Tourist Attractions Rated on Access for the Disabled*, CANBERRA TIMES, Mar. 10, 1998, at A4.

190. *Wheelchair 2 Sydney*, AUSTRALIAN ASSOCIATED PRESS (AAP) NEWSFEED (Sydney), Sept. 8, 1997, available in LEXIS, Aust Library, Aapnew File.

191. See *id.*

192. See *Taxi Takes Patience*, EVENING POST (Wellington), Nov. 23, 1995, at 12.

193. *Id.*

194. *Id.*

195. Adam Shelton, *Taxi Service Might Not Be Adequate*, DOMINION (Wellington), Nov. 23, 1995, at 12.

196. The HREOC received only four complaints about inaccessible transport in 1994. See *Stagecoach Hearing Now Likely in March*, DOMINION (Wellington), Nov. 22, 1995, at

According to Anne Walker, President of the Assembly of People with Disabilities, however, people with disabilities do not complain "because they [are] afraid they might lose the service."<sup>197</sup> This treatment, according to Ms. Hastings, is absurd because people with disabilities "are as entitled to as much adequate transport as anybody."<sup>198</sup> This episode occurred *three years* after the DDA's passage; only then did the HREOC begin drafting accessibility standards for public transport.<sup>199</sup>

#### 5. Employment: the DDA Prevents Employment Discrimination Solely in Hiring and Firing Decisions

Examination of the DDA's application in the employment context reveals another of the Act's inherent flaws. The DDA's employment provisions provide that "an employer need *only* make reasonable accommodations of an employee's disability when making decisions to hire or fire the employee."<sup>200</sup> The Act does not, however, specifically require that an employer reasonably accommodate an employee's disability throughout his or her employment.<sup>201</sup> Therefore, after the initial hiring decision is made, the "Act does not require an employer to reasonably accommodate a current employee's disability when making a decision about such matters as training or promotion."<sup>202</sup>

A statute prohibiting any and all employment discrimination on the basis of disability, regardless of the nature of the decision or circumstance giving rise thereto, would clearly better serve Australians with disabilities.<sup>203</sup> A recent HREOC decision, *Garity v. Commonwealth Bank of Australia*,<sup>204</sup> which awarded damages

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27. In each case, the Commission ruled that the operators acted illegally. *See id.*

197. Shelton, *supra* note 195, at 12.

198. *Id.*

199. If enacted, operators have 15 to 20 years to implement the standards; *see Taxi Takes Patience*, *supra* note 192, at 12.

200. Bourke, *supra* note 83, at 327 (emphasis added) (interpreting DDA, 1992, § 15(4) (Austl.)). "The Act does not state who is to determine the reasonableness of the accommodation . . . ." *Id.* at 327.

201. *See id.*

202. *Id.*

203. *See generally id.*

204. No. H97/191 (unreported HREOC Jan. 25, 1999) (Austl.) available at (visited Sept. 23, 1999) <<http://www.hreoc.gov.au/cgi-bin/programs/view.cgi>>. *See also* Kylie Skipper, \$153,500—and the Bank Says Sorry, *MERCURY* (Hobart), Feb. 6, 1999, at 1. The HREOC ordered the Commonwealth Bank to pay Mrs. Garity, a bank employee with visual impairments and insulin-dependent diabetes, \$153,500.00 in damages for

to a bank employee with visual impairments for the bank's failure to provide her with training and career advancement opportunities,<sup>205</sup> however, indicates that the effects of this legislative oversight may be minimal.

Although the HREOC decisions are often inconsistent, they reflect the Australian Commonwealth's earnest efforts to eliminate disability discrimination. These decisions illustrate the DDA's shortcomings and weaknesses, and demonstrate that the DDA must undergo substantial modification before the Commonwealth brings its goal of eliminating disability discrimination to fruition.

### C. The ADA's Strengths

#### 1. The ADA's Unique Legislative Approach to Disability Issues

The United States' approach to disability discrimination issues, which is distinguishable from its approach to all other discrimination issues, is one of the ADA's strengths.<sup>206</sup> The ADA's drafters recognized that disability issues must be dealt with in a different manner than all other discrimination issues. Many "discriminated groups *are not* objectively 'different' . . . [in that] . . . what they require most of all is legislation prohibiting public

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discrimination. See *Garity*, No. H97/191 sec. 3.1, paras. 3, 5; sec. 8.3.3, para. 11.

205. See generally *Garity*, No. H97/191 sec. 7.1. On February 5, 1999, the bank publicly apologized for "breaches" of the DDA. See Skipper, *supra* note 204, at 1. Although the bank "had an equal opportunity policy of employing people with disabilities, [the bank] had failed to implement the policy in any effective way." *Id.* See also *Aust's CBA Pays Employee \$153,000 for Discrimination Breach*, AUSTRALIAN ASSOCIATED PRESS (AAP) NEWSFEED (Sydney), Feb. 5, 1999, available in LEXIS, Aust Library, Aapnew File (according to the bank's human resources representative, when "Mrs. Garity was first employed . . . , the bank's management 'like the rest of the community, understood much less about the needs of disabled employees than [they] do now.'"). The bank failed to provide Garity with training and advancement opportunities in that, among other things, she did not receive "circulars or memos and did not get to attend regular staff meetings." Skipper, *supra* note 204, at 1. See also *Garity*, H97/191 sec. 3.1, para. 7. The stress from her work at the bank worsened her diabetes, which later caused further damage to her eyesight. See *id.* sec. 3.1, paras. 22-24. Furthermore, Garity, who was a telephone operator, did not receive "specific instructions as to what to do in an emergency." *Id.* sec. 3.1, para. 30. Later, Garity's supervisor instructed her to remain at her desk during fire drills "to deal with telephone calls." *Id.* The Commission held that the bank had denied Garity "the same employment opportunities to training, promotion and retraining . . ." that it would have provided for an employee without a disability. Skipper, *supra* note 204, at 1.

206. See generally Quinn, *supra* note 174, para. 6.

and private actors from treating them as though they *were* different.”<sup>207</sup> In contrast to other discriminated groups, “people with disabilities *are* . . . different.”<sup>208</sup> Therefore, legislation that protects the disability community logically must utilize a different approach than the approach that general discrimination legislation employs.

## 2. Exacting Enforcement and Clear, Effective ADA Compliance Regulations and Guidelines

As a result of the multitude of ADA regulations and guidelines, the U.S. Government’s relatively strict enforcement, and the public’s general awareness, the ADA has made substantial strides to combat disability discrimination. The ADA achieved particular success in implementing guidelines mandating access to services and facilities. Much of this success is attributable to the compliance regulations set forth shortly after the Act’s passage and the fact that the Act required compliance from most entities within five years.<sup>209</sup> By employing a regulation-based method, as opposed to a complaint-based one, the ADA alleviated many barriers for Americans with disabilities.<sup>210</sup>

### *D. The ADA’s Weaknesses*

The United States’ experience with disability discrimination spans several decades and its progress towards eliminating disability discrimination is unparalleled. Despite this extensive background and unequalled progress, legislative design flaws preclude the Act from fully achieving its ultimate goal.

The ADA’s disability definition is the Act’s most significant deficiency. Judicial decisions and ADA statutory interpretations illustrate the shortcomings of the Act’s defining language.<sup>211</sup>

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207. *Id.* (emphases added).

208. *Id.* (emphasis added) (explaining that disability discrimination differs from other types of discrimination because physical characteristics distinguish individuals who have disabilities from those who do not; therefore, effectively legislating equal treatment for individuals with disabilities involves addressing this distinction).

209. *See, e.g.*, 28 C.F.R. § 36.508 (1998); 28 C.F.R. § 35.151(c); 29 C.F.R. § 1630.2(e) (1998).

210. *But see generally* Longmore, *supra* note 44, at 85 (recognizing that the ADA has “not been as effective as originally hoped . . .”).

211. *See infra* Parts IV.D.1–4 (enumerating some of the ADA’s shortcomings).

### 1. Failing to Reasonably Accommodate Individuals with Perceived Disabilities: an ADA Interpretation Oversight

The provision in the ADA's disability definition referring to an individual who is "regarded as" having a disability is often overlooked.<sup>212</sup> The ADA requires an employer to reasonably accommodate "the known physical or mental impairments of an otherwise qualified individual with a disability."<sup>213</sup> In addition, the disability definition "extends to persons who are erroneously perceived . . ." as having a disability, as long as they can perform the essential functions of the job.<sup>214</sup> It rationally follows that individuals who are erroneously perceived as having a disability are among those who should be entitled to ADA reasonable accommodations from their employers.<sup>215</sup> Nevertheless, in *Deane v. Pocono Medical Center*,<sup>216</sup> the court rejected the notion that people with perceived disabilities are entitled to ADA accommodations.<sup>217</sup> The plaintiff in *Deane* was a nurse who, after recovering from a wrist injury incurred at work, informed her hospital employer that she was able to return to work.<sup>218</sup> Because of her limited lifting capabilities, Deane requested a "light duty" position.<sup>219</sup> In response to Deane's request, the hospital concluded that it could not accommodate her medical limitations, and shortly thereafter terminated her employment.<sup>220</sup>

Deane claimed she was protected under the ADA because the hospital "regarded her limitations as being far worse than they actually were, that [the hospital] failed to accommodate her lifting

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212. For the ADA "regarded as having an impairment" provision, see *supra* note 28. This Comment uses the phrases "perceived as" and "regarded as" interchangeably.

213. 42 U.S.C. § 12112(b)(5)(A) (1994).

214. Michael D. Moberly, *Letting the Katz Out of the Bag: the Employer's Duty to Accommodate Perceived Disabilities*, 30 ARIZ. ST. L.J. 603, 634.

215. *See id.*

216. 10 Nat'l Disability L. Rep. (BNA) ¶ 280, at 1003 (3d Cir. Aug. 25, 1997), *vacated, reh'g granted*, 1997 U.S. App. LEXIS 27243 (3d Cir. Oct. 3, 1997); *rev'd and remanded*, 142 F.3d 138 (3d Cir. 1998).

217. *See Moberly, supra* note 214, at 616-617.

218. *See id.* at 617.

219. *Deane*, 142 F.3d at 141; *see also Moberly, supra* note 214, at 618 n.104 ("Reasonable accommodation . . . does not require that an employer create a light-duty position . . . . But if an employer has a vacant light-duty position . . . for which the employee [with a disability] is qualified, it would be a reasonable accommodation to reassign the employee to that position." (citation omitted)).

220. *See Deane*, 142 F.3d at 141.

restriction, and that she was eventually terminated on account of [the hospital]'s erroneous *perception* that she [had a disability].”<sup>221</sup> The *Deane* court rationalized that, in the context of an individual who does not actually have a disability, but is merely regarded as having a disability:

the employer need only be dispossessed of its misperception as it is that which renders the employee disabled. Thereafter, the individual would be neither actually nor statutorily disabled and, like any non-disabled individual would not be able to invoke the accommodations provisions of the ADA for any non-disabling impairments—including the impairment that initially might have given rise to the employer’s perception of a disability. Accommodation, therefore, would play no role in leveling the playing field.<sup>222</sup>

Thus, the court held that individuals who do not “actually” have disabilities but are only perceived as such “are not entitled to accommodation.”<sup>223</sup> One of the court’s puzzling justifications for rejecting Deane’s perceived disability claim was its conclusion that the employer’s perception of Deane’s impairment was not “motivated by ‘myth, fear or stereotype,’ and therefore was not actionable under the ADA.”<sup>224</sup>

On appeal, the court remanded the *Deane* case on a different issue.<sup>225</sup> Although failing to address the matter directly, the appeals court impliedly affirmed the lower court’s conclusion that reasonable accommodation would “not [be] required because [Deane was] a ‘regarded as’ plaintiff.”<sup>226</sup> The *Deane* decision not only discounted the importance of the ADA’s “perceived as” provision, it also ignored the fact that the employee’s coworkers and the employer’s customers often have misperceptions about an employee’s disability.<sup>227</sup> In those instances, “an accommodation

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221. *Deane*, 10 Nat’l Disability L. Rep. at 1004 (emphasis added).

222. *Id.* at 1008 (footnote omitted).

223. *Id.* at 1009; *see also* Moberly, *supra* note 214, at 622 n.146 (acknowledging that the “dicta in the now-vacated *Deane* opinion . . . constitutes generally accepted principles of law under the ADA.” (citation omitted)).

224. *Deane*, 142 F.3d at 144.

225. *See id.* at 148 n.12. The court focused on whether Deane was a “qualified individual” and did not directly address whether or not employers must accommodate a “regarded as” employee when the employee cannot perform the essential functions of the employment position. *See id.*

226. *Id.* at 149.

227. *See* Moberly, *supra* note 214, at 621. *But see* Katz v. City Metal Co., 87 F.3d 26, 32



beyond simply correcting the employer's own misperceptions may be necessary to level the playing field and enable the employee who is erroneously perceived [as having a disability] to compete with other employees."<sup>228</sup>

## 2. By Requiring "Substantial Limitation" of a Major Life Activity, the ADA Substantially Limits Proper Distribution of its Protections

The ADA's "substantial limitation" requirement is another fundamental flaw in the Act's definition of disability. Although an individual may undoubtedly qualify as having a disability, if the disability does not *substantially limit a major life activity*, the individual is not entitled to ADA protection.<sup>229</sup>

Circumstances involving asymptomatic diseases, such as certain stages of HIV, are illustrative of this flaw in the ADA's disability definition. For example, at first glance, "classifying [an asymptomatic disease such as] HIV as a 'disability'—a physical or mental impairment that substantially limits a major life activity—seems simple."<sup>230</sup> According to ADA Title I regulations, a "physical impairment" includes "[a]ny physiological disorder" affecting the "hemic and lymphatic" systems."<sup>231</sup> Thus, because "the HIV virus attacks the hemic and lymphatic systems as soon as it enters the body . . . the HIV infection clearly fits within the regulatory definition of impairment."<sup>232</sup> This language could also apply to other asymptomatic diseases. Unfortunately, because asymptomatic diseases often do not "substantially limit a major life activity," they frequently are not deemed qualified disabilities.

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(1st Cir. 1996) (holding that an individual with an impairment that is not substantially limiting can be considered as having a disability if the individual is *perceived as* having a disability that is substantially limiting).

228. Moberly, *supra* note 214, at 621 (emphasis added) (footnotes omitted). In a situation where the employment barrier arises "from the prejudicial attitudes of an individual's co-workers, . . . mandatory sensitivity training may succeed in educating employees [about] appropriate means of dealing with persons with impairments." *Id.* at 638.

229. Compare 42 U.S.C. § 12102(2)(A) (1994) (containing the ADA's "substantial limitation" language) with the HREOC's reasons for rejecting it; *supra* Part IV.A.1 (discussing the HREOC's reasons for rejecting the ADA's "substantially limits" language).

230. Cameron & Wagner, *supra* note 28, at 5.

231. 29 C.F.R. § 1630.2(h) (1998).

232. Runnebaum v. NationsBank, 123 F.3d 156, 183 (4th Cir. 1997) (Michael, J., dissenting).

Title I regulations stipulate that HIV infection is an “inherently substantially limiting” disability.<sup>233</sup> Accordingly, in *Bragdon v. Abbott*,<sup>234</sup> the U.S. Supreme Court concluded that HIV is a disability,<sup>235</sup> even when the infection has not yet progressed to the “so-called [ ]symptomatic phase, . . .” because the virus attacks the immune system, and because it substantially limits the life activity of reproduction.<sup>236</sup> The Court reasoned that HIV substantially limited the ability to reproduce because of the risk of transmission to a sexual partner or to a child “during gestation and childbirth.”<sup>237</sup>

On “closer inspection, characterizing HIV as a disability is not so easy.”<sup>238</sup> In view of its determination that HIV is a substantially limiting impairment, the *Bragdon* Court did not address whether HIV infection is a “*per se* disability under the ADA.”<sup>239</sup> Although the nature of HIV and its corresponding relationship to AIDS was well documented when the ADA was enacted in 1990, Congress did not, at that time, immediately mandate that HIV could be characterized as a disability for purposes of the ADA.<sup>240</sup> The U.S. Supreme Court in *Bragdon*, however, mitigated Congress’ oversight. The *Bragdon* decision only applies to AIDS and HIV, and thus does not repair the ADA’s disheartening omission of many other asymptomatic diseases, such as some stages of cancer and carpal tunnel syndrome, diabetes, hypertension, or hepatitis C.<sup>241</sup> The *Bragdon* Court “neither addressed nor resolved” whether asymptomatic diseases other than HIV and AIDS would be deemed qualified disabilities under the ADA.<sup>242</sup>

Pre-*Bragdon* decisions reasoned that asymptomatic HIV did not qualify as an ADA disability because “without symptoms,

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233. 29 C.F.R. pt. 1630 app. § 1630.2(j) (1998).

234. 118 S. Ct. 2196, 2196 (1998).

235. See *id.* But see *id.* at 2215 (Rehnquist, C.J., dissenting) (arguing that reproduction is “not necessarily a major life activity . . .”).

236. *Id.* at 2209.

237. *Id.* at 2206.

238. Cameron & Wagner, *supra* note 28, at 6.

239. *Bragdon*, 118 S. Ct. at 2207.

240. See Cameron & Wagner, *supra* note 28, at 6.

241. See *id.* at 3 (footnotes omitted).

242. *Id.* The U.S. Supreme Court’s conclusion in *Sutton v. United Airlines, Inc.*, strongly suggests that asymptomatic diseases other than HIV and AIDS will not be deemed disabilities under the ADA. See 119 S. Ct. 2139, 2147 (1999) (remarking that without symptoms, an asymptomatic disease would likely not be considered an impairment that “presently ‘substantially limits’ a major life activity.”).

there are no diminishing effects on the individual.”<sup>243</sup> Some courts accept the notion that HIV does not affect a major life activity because:

although ‘procreation is a fundamental human activity, [it is] not certain that it is one of the major life activities contemplated by the ADA;’ and in any event, HIV is not substantially limiting, because it is ‘the conscience or normative judgment of the particular infected person,’ not the impairment, that substantially limits procreation.<sup>244</sup>

Despite these arguments, asymptomatic HIV and AIDS now qualify for ADA protection while other asymptomatic diseases still may not. The sweeping disqualification of individuals with asymptomatic diseases from ADA protection directly contradicts the Act’s underlying policy that “society’s accumulated myths and fears about disability and disease[s] are as handicapping as are the physical limitations that flow from [the] actual impairment[s].”<sup>245</sup> Proper implementation of this policy leads to the conclusion that disabilities, even those that may be asymptomatic, should receive ADA protection.

The decision in *Madjlessi v. Macy’s West, Inc.*<sup>246</sup> further evinces that neither the “substantially limits” language nor the “regarded as” protections are sufficient to protect people with asymptomatic disabilities from discrimination. Madjlessi was an employee of Macy’s West Department Store (Macy’s).<sup>247</sup> After she was diagnosed with breast cancer, Madjlessi continued to work for Macy’s during her chemotherapy treatments, taking a few days off work each month to recover from the treatment’s side effects.<sup>248</sup> Despite favorable employment ratings, after several departmental transfers and at least one demotion, Macy’s terminated Madjlessi’s employment.<sup>249</sup> Madjlessi alleged that she

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243. *Runnebaum v. NationsBank*, 123 F.3d 156, 168 (4th Cir. 1997).

244. *Cameron & Wagner, supra* note 28, at 6 & 10 nn.64–65 (footnotes omitted) (quoting *Runnebaum*, 123 F.3d at 170–171). The court also noted that “[e]xtending the coverage of the ADA to asymptomatic conditions . . . would run counter to Congress’[] intention as expressed in the plain statutory language.” *Runnebaum*, 123 F.3d at 168.

245. *School Bd. v. Arline*, 480 U.S. 273, 284 (1987) (footnote omitted).

246. 993 F. Supp. 736 (N.D. Cal. 1997).

247. *See id.* at 737.

248. *See id.* at 738.

249. *See id.*

was discriminated against on the basis of her breast cancer, that she had an ADA qualified disability, and thus that her termination was unlawful.<sup>250</sup>

In rejecting Madjlessi's claim that she was "substantially limited" in one or more of her 'major life activities,'"<sup>251</sup> the court noted that although Madjlessi "worked while suffering the side effects of vomiting, weakness and nausea, this alone [did] not satisfy the 'substantial[ly] limits' standard."<sup>252</sup> The court also rejected Madjlessi's argument that the documentation of her cancer diagnosis and records of her chemotherapy treatments qualified her as having a disability under the "history of a disability" prong of the ADA's "disability" definition.<sup>253</sup> As a final alternative, Madjlessi offered that her breast cancer was a qualified disability because other employees thought that her cancer substantially limited her ability to work.<sup>254</sup> According to the court, the ADA's "reference to a substantial limitation indicates that an employer regards an employee as [substantially limited] in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved."<sup>255</sup> Thus, because Macy's continued to employ Madjlessi after the onset of her impairment, the court concluded that Madjlessi could not support a claim that Macy's regarded her as "substantially limited."<sup>256</sup> Because Madjlessi failed to establish that she had a substantially limiting qualified disability, the court dismissed her complaint.<sup>257</sup>

"Failing to make reasonable accommodations is . . . one type of discrimination that the ADA is intended to deter."<sup>258</sup> The ADA's policy and intent support the notion of protecting

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250. *See id.* at 738-740.

251. *Id.* at 740.

252. *Id.* at 741.

253. *See id.* at 741-742. *See also generally* 42 U.S.C. § 12102(2)(A)-(C) (1994). For the ADA "disability" definition, *see supra* note 10.

254. *See Madjlessi*, 993 F. Supp. at 742.

255. *Id.* (citation omitted). *Accord* *Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139, 2151 (1999) (holding that when "the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs."). "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.*

256. *Madjlessi*, 993 F. Supp. at 742.

257. *See id.* at 736.

258. *Moberly*, *supra* note 214, at 640.

individuals with perceived disabilities; punishing those who discriminate based on the erroneous perception that an individual has a disability "deters discrimination against those who actually have disabilities."<sup>259</sup>

Until recently, some federal courts accepted the notion that an individual with an impairment that is not substantially limiting (or with no impairment at all) is nevertheless an ADA qualified individual if the individual is treated "as having an impairment that does substantially limit [his or her] major life activities."<sup>260</sup> This interpretation, however, was never adopted as the universal standard, and was subsequently rejected by the U.S. Supreme Court in *Sutton v. United Airlines, Inc.*<sup>261</sup> In *Sutton*, the Court held that, in order to demonstrate a disability, the ADA's language requires a person have a present substantial limitation.<sup>262</sup>

### 3. Abandoning the ADA Statutory Entitlements of Individuals with Controlled Impairments

A "controlled impairment" is "one that would substantially limit a major life activity if untreated, but that does not limit any such activity when treated with some mitigating measure."<sup>263</sup> According to one of the EEOC's ADA interpretive guidelines, the "existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices."<sup>264</sup> Pursuant to this guideline, referred to as the "no mitigating measure guideline,"<sup>265</sup> individuals with controlled impairments have ADA disabilities "even if they do not experience [or have never experienced] a substantial limitation in any major life activity."<sup>266</sup> Thus, the EEOC deemed it necessary

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259. *Id.* at 620 (emphasis added).

260. *Katz v. City Metal Co.*, 87 F.3d 26, 32 (1st Cir. 1996). *But see* Moberly, *supra* note 214, at 628 (discussing that some courts subscribe to the notion that "the duty to make a reasonable accommodation arises only when the individual [has a disability]; no such duty arises when the individual merely is 'regarded as' [having a disability] . . . ." (citation and footnote omitted)).

261. 119 S. Ct. 2139 (1999).

262. *See id.* at 2141.

263. Erica Worth Harris, *Controlled Impairments Under the Americans with Disabilities Act: A Search for the Meaning of Disability*, 73 WASH. L. REV. 575, 580 (1998).

264. 29 C.F.R. pt. 1630 app. § 1630.2(h) (1998) (EEOC regulations); *see also* 28 C.F.R. pt. 35 app. A § 35.104 (1998) (DOJ regulations).

265. Harris, *supra* note 263, at 579-580.

266. *Id.* at 580.

to determine the existence of an impairment without regard to mitigating measures.<sup>267</sup>

Although eight of the nine federal courts of appeal addressing the controlled impairments issue adopted the EEOC guideline,<sup>268</sup> lower courts were undecided as to whether the “no mitigating measures guideline” was a binding legislative rule or merely an interpretive rule<sup>269</sup> until the 1999 U.S. Supreme Court decision in *Sutton*. The stipulation that a major life activity be impaired often renders it *impossible* to determine the existence of an impairment without regard to mitigating measures. If an individual’s impairment is temporary, occurs sporadically or seasonally, or is effectively masked by medication at the time the disability determination is made, then no life activity is impaired; thus the individual may not receive ADA protection.

Critics of the “no mitigating measures guideline” contend that individuals with controlled impairments are not worthy of inclusion in the ADA’s protected classes because the individuals are not substantially limited in one or more major life activity.<sup>270</sup> It is difficult to believe, however, that “Congress wished to provide protection to workers who leave it to their employer to accommodate their impairments but to deny protection to workers who act independently to overcome their disabilities.”<sup>271</sup> Ignoring

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267. The EEOC is one of the entities charged with promulgating regulations for compliance with the ADA. See 42 U.S.C. § 12116 (1994). No agency, however, “has been given authority to issue regulations implementing the generally applicable provisions of the ADA . . . . Most notably, no agency has been delegated authority to interpret the term ‘disability.’ . . . . The EEOC has, nonetheless, issued regulations to provide additional guidance regarding the proper interpretation of this term.” *Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139, 2145 (1999).

268. See *Sutton*, 119 S. Ct. at 2153 (Stevens, J., dissenting). The U.S. Supreme Court did not make a determination on the issue until the 1999 *Sutton* case. See generally *id.*

269. See Harris, *supra* note 263, at 602. The consequence of declining to follow the guideline is that the “net result [of the disability determination] is that a mere medical diagnosis of a disability is not enough. The disability in question must also lead to the substantial impairment of a major life activity.” QUINN ET AL., *supra* note 2, at 51. See Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the “Disability” Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1457 (1999) (explaining that the disability determination thereby often creates “a catch-22 for plaintiffs. In order to prevail, plaintiffs must prove not only a substantial limitation but also must prove that they are qualified for the job opportunities or services that defendants have denied them.” (footnote omitted)).

270. See Harris, *supra* note 263, at 607 (arguing that “[t]he term ‘disability’ can be continuously manipulated and expanded until it loses any coherent meaning or practical limit.”).

271. Isaac S. Greaney, Note, *The Practical Impossibility of Considering the Effect of*

this reality, and this EEOC guideline, effectively robs individuals with controlled impairments of protections to which they should be statutorily entitled.<sup>272</sup>

The U.S. Supreme Court addressed the EEOC guideline's validity in *Sutton* and determined that the guideline was "an impermissible interpretation of the ADA."<sup>273</sup> In *Sutton*, United Airlines denied applicants with visual impairments (myopia) employment positions as global airline pilots because the applicants failed to meet the airline's minimum uncorrected visual acuity requirement.<sup>274</sup> The Court held that the applicants were not ADA "qualified individuals" because, by virtue of the fact that their impairments were corrected with mitigating measures, they were not "presently" substantially limited.<sup>275</sup> The Court interpreted the ADA's disability definition "as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."<sup>276</sup> Accordingly, the Court made the disability determination "with reference to corrective measures"<sup>277</sup> and held that the applicants were unable to establish "that they were substantially limited in

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*Mitigating Measures under the Americans with Disabilities Act of 1990*, 26 FORDHAM URB. L.J. 1267, 1291 (1999) (footnote omitted). "For example, the ADA would not protect a claimant who regularly takes prozac, but would protect a similarly situated claimant who, rather than take medication, demanded accommodations from his employer." *Id.* at 1291–1292 (footnote omitted).

272. *But see* Harris, *supra* note 263, at 603–604 (arguing that "substantially limits" does not include an impairment that *may* substantially limit a major life activity; the EEOC guideline changes the meaning of "substantially limits" to "would, could or might substantially limit."); Michael J. Puma, Note, *Respecting the Plain Language of the ADA: A Textualist Argument for Rejecting the EEOC's Analysis of Controlled Disabilities*, 67 GEO. WASH. L. REV. 123, 142 (1998) (noting that the "textualist method of statutory interpretation," which compels courts "to seek the meaning of a statute in its text first and to resort to agency interpretations and legislative history only when the plain meaning of the text is unclear[.]" supports rejection of the EEOC guideline).

273. *Sutton*, 119 S. Ct. at 2141.

274. *See id.* The United Airlines visual acuity requirement stipulated that all United Airlines global pilots have "uncorrected visual acuity of 20/100 or better . . ." *Id.* The applicants in *Sutton* each "ha[d] uncorrected visual acuity of 20/200 or worse, but with corrective measures, both function[ed] identically to individuals without similar impairments." *Id.*

275. *Id.* at 2146–2147.

276. *Id.* at 2146. The Court also noted that "[t]o be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not 'substantially limi[t]' a major life activity." *Id.* at 2147.

277. *Id.* at 2149.

any major life activity.”<sup>278</sup>

In *Sutton*, the U.S. Supreme Court, with its “miserly”<sup>279</sup> construction of the ADA, concluded that “Congress did not intend to bring under the statute’s protection all those whose corrected conditions amount to disabilities.”<sup>280</sup> Congressional findings estimated that there were approximately forty-three million Americans with disabilities when the ADA was enacted.<sup>281</sup> The Court compared these findings to other estimates and census data, most of which estimated a much higher number of Americans with disabilities.<sup>282</sup> The Court then concluded that:

Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it would undoubtedly have cited to a much higher number of disabled persons in the [ADA’s] findings. That it did not is evidence that the ADA’s coverage is restricted to only those whose impairments are not mitigated by corrective measures.<sup>283</sup>

The ADA’s legislative history makes it “abundantly clear that Congress intended the ADA to cover individuals who could perform all of their major life activities only with the help of ameliorative measures.”<sup>284</sup> Nevertheless, the Court used Congress’ “legislative myopia,”<sup>285</sup> in failing to accurately foresee the number of Americans with disabilities, to further constrict the ADA’s application.

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278. *Id.*

279. *Id.* at 2152 (Stevens, J., dissenting) (noting that, “in order to be faithful to the remedial purpose of the Act, [the Court] should give it a generous, rather than a miserly, construction.”).

280. *Id.* at 2147.

281. *See id.*; *see also* 42 U.S.C. § 12101(a)(1) (1994).

282. *See Sutton*, 119 S. Ct. at 2148 (referring to a 1988 report by the National Council on Disability, which estimated that the number ranged from an “overinclusive 160 million . . . to an underinclusive 22.7 million . . .”).

283. *Id.* at 2149.

284. *Id.* at 2154 (Stevens, J., dissenting). As evidence of Congress’ intent, Justice Stevens cited a Senate Report, stating that “whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids . . .” and a House Committee on the Judiciary Report reiterating the same sentiment. *Id.* at 2154–2155 (referring to S. REP. NO. 101–116, at 23 (1989); H.R. REP. NO. 101–485, pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 450).

285. *Sutton*, 119 S. Ct. at 2152 (Stevens, J., dissenting).



#### 4. The ADA's Neglected Cosmetic Disfigurement Provision

The very mention of "cosmetic disfigurements"<sup>286</sup> in the ADA's "physical or mental impairment" definition<sup>287</sup> implies that individuals with physically disfiguring impairments qualify for ADA protection. This conclusion is supported by the Act's underlying policies, especially the notion that society's fears and stereotypes often represent more of a barrier to individuals with disabilities than are the actual disabilities.<sup>288</sup> Courts, however, are reluctant to recognize physical disfigurements as ADA disabilities.<sup>289</sup>

In *Johnson v. Dunhill Temporary Systems, Inc.*,<sup>290</sup> Johnson contended that he was fired from his telemarketing job because of his physical disfigurement, namely that he was missing eighteen teeth.<sup>291</sup> Johnson claimed that because his disfigurement was a disability under the ADA, his employer's failure to provide him with a reasonable accommodation was unlawful.<sup>292</sup> In response, Johnson's employer claimed that Johnson was dismissed because he mumbled on the telephone.<sup>293</sup>

To qualify as an "individual with a disability" under the ADA, an individual's disability must substantially limit one or more major life activities.<sup>294</sup> The *Johnson* court acknowledged that "speaking and working qualify as major life activities."<sup>295</sup> Nevertheless, because Johnson did "not allege that he [spoke] in a manner which restrict[ed] him or his ability to work[.]"<sup>296</sup> rather, he alleged that his employers' "misperception of his ability to speak ha[d] caused them to significantly restrict his ability to

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286. See 29 C.F.R. § 1630.2(h)(1) (1998).

287. See *id.* § 1630.2(h)(1)-(2). For the ADA "physical impairment" definition, see *supra* note 24.

288. See generally 42 U.S.C. § 12101(a)(7) (1994).

289. See, e.g., *Van Sickle v. Automatic Data Processing, Inc.*, 952 F. Supp. 1213, 1223 (E.D. Mich. 1997) (holding that an employer's comments on an employee's six-inch long facial scar, including "scar-face," were insufficient to establish disability discrimination).

290. 11 Nat'l Disability L. Rep. (BNA) ¶ 78, at 320 (N.D. Ill. Oct. 24, 1997); *reh'g denied*, 151 F.3d 1033 (7th Cir. 1998).

291. See *Johnson*, 11 Nat'l Disability L. Rep. (BNA) at 320.

292. See *id.*

293. See *id.*

294. 42 U.S.C. § 12102(2)(A) (1994). For the ADA "major life activity" definition, see *supra* note 26.

295. *Johnson*, 11 Nat'l Disability L. Rep. (BNA) at 321.

296. *Id.*

work,” the court held that Johnson was not an ADA qualified individual with a disability.<sup>297</sup>

The *Johnson* court noted that the “significant restriction of a major life activity screens [out] trivial claims[,]” which is how the court categorized Johnson’s cosmetic disfigurement claim.<sup>298</sup> Although the strength of Johnson’s claim is debatable, the holding in *Madjlessi*<sup>299</sup> strongly suggests that the application of the major life activity restriction may screen out meritorious claims as well.

### *E. The ADA and the DDA: A Comparison*

It is estimated that one in five Americans has some type of disability.<sup>300</sup> Individuals with disabilities are the single largest minority group in the United States, comprising roughly twenty percent of the population.<sup>301</sup> In Australia, individuals who identify themselves as having disabilities constitute eighteen percent of the population.<sup>302</sup> As the number of individuals with disabilities continues to grow, it becomes increasingly evident that the rights of the disability community require effective protection. To ensure such protection, the legislative weaknesses in the ADA and the DDA must be directly remedied.

#### 1. Australia’s Continued Access Problems

Although the DDA may or may not require public entities to consistently accommodate individuals with disabilities, it clearly does not prohibit these entities from charging additional fees for “special” services.<sup>303</sup> In contrast, not only does the ADA categorically require that covered entities accommodate the access needs of the disability community, it also prohibits these entities from charging additional fees for accommodated services.<sup>304</sup>

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297. *Id.*

298. *Id.* (stating that Johnson’s claim was, in fact, “one such trivial claim.”).

299. *Madjlessi v. Macy’s West, Inc.*, 993 F. Supp. 736 (N.D. Cal. 1997).

300. See Barbara A. Petrus & J. Denice von Gnechten, *A Primer on the Americans with Disabilities Act*, HAW. B.J., June 1998, at 6, 6 & n.1 (1998), available in Westlaw, 2-Jun Haw. B.J. 6.

301. See *id.* (stating that these numbers are likely to increase as the population ages).

302. See Laffan, *supra* note 188, at 42.

303. See, e.g., discussion *supra* Part IV.B.4.

304. See 28 C.F.R. § 36.301(c) (1998) (stipulating that a public accommodation may not impose a surcharge on an individual with a disability to cover the costs of accommodations that are necessary to provide that individual with the nondiscriminatory treatment required by the ADA). See also 28 C.F.R. § 35.130(f) (1998).

## 2. The Superiority of the United States' Disability Legislation Framework

Critics of the DDA complain that the Commonwealth used "[t]oo little imagination"<sup>305</sup> in drafting the Act. Specifically, critics allege that the DDA "remained within the traditional Australian anti-discrimination law design instead of adopting a new model more appropriate for people with disabilities."<sup>306</sup> Although one option available to the DDA's drafters was the ADA's "regulation-based" approach, the Australian Commonwealth ultimately utilized a "complaint-based method" for the DDA's framework.<sup>307</sup> The complaint-based approach is less effective than the ADA's approach because it "does not require disability standards be . . . promulgated with respect to access to premises or goods, services, and facilities."<sup>308</sup>

Furthermore, as Quinn suggests,<sup>309</sup> it is problematic to apply traditional, generic anti-discrimination framework, which relies on a basic test of comparability, to the unique problem of disability discrimination.<sup>310</sup> When there are *real* differences between the persons compared, as with disability issues, the "comparison will be impossible."<sup>311</sup> In drafting the DDA, the Australian Commonwealth declined to follow the ADA's approach that legislates "a right to fair treatment,"<sup>312</sup> and thus avoids "the need to make comparisons with others."<sup>313</sup> In its place, Australia adopted a "victim-based approach," because the DDA's drafters felt that it would be "too radical to change the whole [discrimination legislation] paradigm to deal with the issue of disability."<sup>314</sup>

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305. Tyler, *supra* note 78, at 224.

306. *Id.*

307. *Id.*

308. Tucker, *supra* note 12, at 17.

309. For the Quinn discussion, see *supra* text accompanying notes 170-177.

310. See generally *supra* text accompanying notes 174-176.

311. Tyler, *supra* note 78, at 225.

312. *Id.*

313. *Id.*

314. *Id.*

### 3. Dealing Effectively with Cosmetic Disfigurements

Both the DDA and the ADA include provisions to protect individuals with cosmetic disfigurements from discrimination.<sup>315</sup> Under the ADA, these impairments *should* qualify as disabilities under either the definition of disability itself, or under the “perceived as” provision. Unfortunately, the “substantially limits” requirement precludes these applications.<sup>316</sup>

Presently, there are no published judicial interpretations of the DDA’s disfigurement provision. Because the DDA does not contain the ADA’s “substantially limits” language, however, it is possible that, unlike U.S. courts, Australian courts will interpret the provision in accordance with the drafters’ intent.

### 4. Expanding the ADA’s Disability Definition

Clearly the ADA’s weakest element is its definition of disability.<sup>317</sup> The flaws in this definition are reflected in the restrictive “substantially limits” requirement, the neglected cosmetic disfigurement and “perceived as” disabilities provisions, and the courts’ refusal to extend ADA protection to individuals with controlled impairments.

In drafting the DDA, the HREOC expressly rejected the ADA’s “substantially limits” language.<sup>318</sup> According to the HREOC, the “requirement that a person’s impairment substantially limit[] major life activities is a source of unnecessary legal difficulties or complexities.”<sup>319</sup> In particular, the HREOC viewed the ADA’s disability definition as “posing difficulties for people whose condition has disabling effects only intermittently rather than continuously or whose condition is controlled by medication and/or other treatments.”<sup>320</sup> In rejecting this language, the HREOC may have eluded the problems that will ensue in the

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315. See 42 U.S.C. § 12102(2) (1994); see also 29 C.F.R. § 1630.2(h)(1) (1998); for the ADA provisions, see *supra* notes 10, 24. See also DDA, 1992, § 4(e) (Austl.); for the DDA provision, see *supra* note 9.

316. See *supra* Part IV.D.2 (discussing the effects of the ADA’s “substantially limits” requirement).

317. See 42 U.S.C. § 12102(2)(A)–(C). For the ADA “disability” definition, see *supra* note 10.

318. See QUINN ET AL., *supra* note 2, at 128.

319. *Id.*

320. *Id.*

United States as a result of the *Sutton* decision.<sup>321</sup>

### 5. Perfecting the DDA and ADA Employment Provisions

Although the ADA's disability definition is inferior to the DDA's, many of the protections the ADA provides in the employment arena are superior. Thus, although the DDA's broad definition includes deserving individuals excluded by the ADA, the protections the DDA provides for these individuals are often inconsequential. For example, in the context of employment, the ADA prohibits disability discrimination in "application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."<sup>322</sup> In barring discrimination, the ADA requires that reasonable accommodations be made for qualified individuals in *all* of the aforementioned areas.<sup>323</sup>

Conversely, although the DDA purportedly bars all employment discrimination, the DDA only requires an employer to reasonably accommodate an employee's disability when making decisions "about whether to refuse to hire or to fire the employee."<sup>324</sup> The DDA imposes no obligation on employers to accommodate "a current employee's disability when making a decision about such matters as training or promotion."<sup>325</sup> This distinction reflects the differences between the approaches utilized in the DDA and the ADA. Both laws claim to bar all discrimination on the basis of disability, but fail to achieve this objective in specific respects. Part of the DDA's failure to eliminate employment discrimination is attributable to the fact that the DDA follows the "recognized Australian model of prohibiting discrimination on *certain grounds* when it takes place in *certain defined areas*."<sup>326</sup> This model creates a dichotomy wherein discrimination on the grounds of disability is prohibited in

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321. Such as problems that result from omitting certain disabilities from the Act's protection, despite the fact that congressional intent dictates their inclusion. See discussion *supra* notes 284-285 and accompanying text. Examples include: diabetes, epilepsy, hypertension, and monocular vision. See generally *id.*

322. 42 U.S.C. § 12112(a).

323. See *id.* § 12112(b)(5)(A) (defining the term "discriminate," to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee . . .").

324. Bourke, *supra* note 83, at 327.

325. *Id.*

326. Tyler, *supra* note 78, at 220 (emphases added).

workplace hiring and firing decisions, but is permitted in employee advancement and training decisions.

In the employment context, there is another significant difference between the DDA and the ADA with respect to which entities the legislation covers. Title I of the ADA only prohibits disability discrimination by employers with fifteen or more employees.<sup>327</sup> In comparison, the DDA prohibits disability discrimination by "all employers, regardless of the number of employees."<sup>328</sup>

#### 6. Protecting, as Intended by Both U.S. and Australian Legislatures, Individuals with Imputed or Perceived Disabilities

As both Acts recognize that the public's perception of and reaction to individuals with disabilities is a large part of the disability discrimination phenomenon, it is imperative that those individuals "perceived as"<sup>329</sup> having disabilities, or who have disabilities "imputed to"<sup>330</sup> them, fall within the protected classes of qualified individuals. These provisions *should* protect individuals whose impairments are not substantially limiting, but are perceived by others as substantially limiting, individuals who have temporary disabilities,<sup>331</sup> as well as individuals who have no impairments but whom others perceive as having substantially limiting impairments. Perceptions of disabilities are often more substantially limiting than the disabilities themselves.<sup>332</sup> Erroneous perceptions based on "stereotypic assumptions"<sup>333</sup> are precisely the type of discrimination against which both Acts were designed to protect.<sup>334</sup>

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327. See 42 U.S.C. § 12111(5)(A).

328. Tucker, *supra* note 12, at 24.

329. See 42 U.S.C. § 12102(2)(C)(3). For the ADA "perceived disability" definition, see *supra* note 28.

330. See DDA, 1992, § 4(k) (Austl.). For the DDA "imputed disabilities" provision, see *supra* note 9.

331. See 29 C.F.R. pt. 1630 app. § 1630.2(j) (1998) (providing that "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities.").

332. See Moberly, *supra* note 214, at 637.

333. 42 U.S.C. § 12101(a)(7).

334. See Moberly, *supra* note 214, at 637-638 n.265 ("It is of little solace to a person denied employment to know that the employer's view of his or her condition is erroneous. To such a person, the perception of the employer is as important as reality." (citation omitted)).

It is inconsistent with the purposes of the DDA and the ADA "to relieve employers who . . . discriminate of liability if, although they acted in a prohibited discriminatory manner, it later turns out that their belief was in fact erroneous."<sup>335</sup> In order for the ADA and the DDA to fulfill their purposes, "the key . . . is that the employer acted on the *belief* of a [disability]."<sup>336</sup>

Although comparison is impossible because there are no Australian cases on point, hopefully, Australian courts will utilize the DDA's "imputed" disabilities provision and refrain from the over-zealous hesitancy that afflicts the U.S. courts' narrow construction of the ADA's "perceived" disabilities provision.

## V. CONCLUSIONS AND RECOMMENDATIONS

The DDA is an exceptional law with "the potential to enable people with disabilities to become fully participating members of Australian society, *if* [among other things] the disability standards are properly drafted [and enforced], and *if* the Act is interpreted in the manner in which it was intended . . . ."<sup>337</sup> Most importantly, the DDA represents a significant step, however small, towards the eventual elimination of disability discrimination in Australia. Australia's progress in this anti-discrimination endeavor, however, is impeded by its use of the complaint-based method. Punishing discrimination after-the-fact is too slow a mechanism to bring about the type of attitudinal change that Australia so desperately requires.

It is often argued that "change in community attitudes can never be achieved through legislation . . . [alone]."<sup>338</sup> Whether or not this is true for Australia will only be seen in time. Until then, people with disabilities, as well as "everyone to whom the DDA applies, *must* be educated."<sup>339</sup> "[L]egislation is not supposed to be the only tool through which the progress is achieved: it is precisely the interaction of the legislation and other means of persuasion that is likely to have an effect in changing attitudes."<sup>340</sup> "Research and community education are very important in providing a barrier-free environment and will interact with legislation to

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335. *Id.* at 641.

336. *Id.* (footnote omitted).

337. TUCKER, *supra* note 11, at 20-21.

338. Tyler, *supra* note 78, at 226.

339. Tucker, *supra* note 12, at 18 (emphasis added).

340. Tyler, *supra* note 78, at 227.

achieve this objective.”<sup>341</sup> One of the DDA’s primary objectives, promoting recognition and acceptance of the disability community’s entitlement to equality,<sup>342</sup> will be thwarted until the Australian public receives such an education.

Although the ADA is described as a “virtual revolution”<sup>343</sup> in recognizing the rights of the disability community, its definition of disability still needs expansion. By ignoring the needs of certain sectors of the disability community, the ADA hinders its own progress. The ADA’s goals must focus on eliminating *all* discrimination against *all* members of the disability community, including, for example, individuals with controlled impairments. Application of the *Sutton* case will likely preclude this outcome until the ADA undergoes amendment.

The most effective approach to ensuring the rights of individuals with disabilities cannot be found either in the United States’ disability legislation or in its Australian counterpart, but in a combination thereof. Nations looking to adopt or amend any present disability legislation would be well advised to examine the shortcomings in the ADA and DDA, and learn from the mistakes made therein.

Both the United States and Australian legislatures should amend their current disability discrimination laws. Congress must expand the ADA’s definition of “disability” to include impairments such as asymptomatic diseases and physical disfigurements. In addition, the protections for individuals with controlled and intermittent disabilities must be reestablished.

Australia should adopt a “reasonable accommodation” approach similar to the approach Congress intended for the ADA. This approach has been referred to as the “essential key in making anti-discrimination law work in the context of disability.”<sup>344</sup> Although the Australian Commonwealth applies a derivative of the reasonable accommodation approach, the vagueness of the DDA’s approach compromises its effectiveness. It is still unclear whether the DDA’s “inherent requirements”<sup>345</sup> concept requires that a reasonable accommodation be made in deciding a person’s

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341. *Id.* (footnote omitted).

342. See DDA, 1992, § 3(c) (Austl.).

343. *Trautz v. Weisman*, 819 F. Supp. 282, 294 (S.D.N.Y. 1993). See also Moberly, *supra* note 214, at 608 & n.32.

344. Quinn, *supra* note 174, para. 24.

345. DDA § 15(4)(a).



capacity to perform the requirements of an employment position.<sup>346</sup>

The reasonable accommodation approach is better suited to deliver the protections that the HREOC undoubtedly intended the DDA to provide for Australians with disabilities. For example, in employment hiring practices, permitting a person with a disability to qualify for protections if they can perform a job "with or without reasonable accommodations," would most certainly be more effective than requesting that the potential employer simply ignore the disability. Further, protection against discrimination must be provided for individuals with disabilities in *all* areas of employment, not just with respect to hiring and firing decisions.

Finally, community education and awareness programs must accompany any changes in either the DDA or the ADA. Although the causes of discrimination are unknown, it is "clearly related to unease, inexperience, and ignorance."<sup>347</sup> Although ease and experience may only come in the future, ignorance can, and must, be affirmatively eliminated in the present.

If the Australian legislature implements DDA guidelines for reasonable accommodations and access regulations, and the United States legislature modifies the ADA's defining language so as to increase its inclusivity, both the DDA and the ADA may become that which their respective drafters intended: truly effective disability discrimination legislation.

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346. See generally Quinn, *supra* note 174, paras. 20–24.

347. Tyler, *supra* note 78, at 228.

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